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## Fact-Finding by International Nongovernmental Human Rights Organizations

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# Fact-Finding by International Nongovernmental Human Rights Organizations

BY DAVID WEISSBRODT\* AND JAMES MCCARTHY\*\*

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There are a considerable number of nongovernmental organizations (NGOs) engaged in overseeing the implementation of human rights by governments throughout the world.<sup>1</sup> Working at the international<sup>2</sup> and national levels,<sup>3</sup> these organizations function as

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1. See Cassese, *Progressive Transnational Promotion of Human Rights*, in *Human Rights: Thirty Years After the Universal Declaration* 249 (B. Ramcharan ed. 1979); Dahlen, *NGO Organizations for Action*, 30 *Associations Transnationales* 8-14 (1978); Forsythe & Wiseberg, *Human Rights Protection: A Research Agenda*, *Universal Human Rights*, Oct.-Dec. 1979, at 1, 15-19; Green, *NGOs, in Human Rights and World Order* 90 (A. Said ed. 1978); Leary, *A New Role for Non-governmental Organizations in Human Rights*, in *UN Law/Fundamental Rights* 197 (A. Cassese ed. 1979); Leary, *The Implementation of the Human Rights Provisions of the Helsinki Final Act, A Preliminary Assessment: 1975-1977*, in *Human Rights, International Law and the Helsinki Accord* 111, 121-27 (T. Buergenthal ed. 1977) [hereinafter cited as *Leary, Helsinki Final Act*]; Rees, *Exercises in Private Diplomacy*, in *Unofficial Diplomats* 111, 126-29 (M. Berman & J. Johnson eds. 1977); Reynolds, *Highest Aspirations or Barbarous Acts . . . The Explosion in Human Rights Documentation: A Bibliographic Survey*, 71 *L. Lib. J.* 1, 42-45 (1978); Rodley, *Monitoring Human Rights Violations in the 1980s*, in *Enhancing Global Human Rights* 119-51 (J. Domínguez, N. Rodley, B. Wood & R. Falk eds. 1979); Scoble & Wiseberg, *Human Rights NGOs: Notes Towards Comparative Analysis*, 9 *Revue des Droits de l'Homme* 611 (1976); Shestack, *Sisyphus Endures: The International Human Rights NGO*, 24 *N.Y.L. Sch. L. Rev.* 89 (1978); Skjelsbaek, *The Growth of International Nongovernmental Organizations in the Twentieth Century*, 25 *Int'l Org.* 420 (1971), reprinted in *Transnational Relations and World Politics* 70 (R. Keohane & J. Nye eds. 1972); Weissbrodt, *The Role of International Nongovernmental Organizations in the Implementation of Human Rights*, 12 *Tex. J. Int'l L.* 293 (1977); [hereinafter cited as *Weissbrodt, International NGOs*]; Wiseberg & Scoble, *Monitoring Human Rights Violations: The Role of Nongovernmental Organizations*, in *Human Rights and American Foreign Policy* 179 (D. Kommers & G. Loescher eds. 1979); Note, *The Role of Nongovernmental Organizations in Implementing Human Rights in Latin America*, 7 *Ga. J. Int'l & Comp. L.* 476 (1977). See generally *International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1974) [hereinafter cited as *House Hearings on International Protection of Human Rights*]. For current information on human rights activities by nongovernmental organizations, see the *Human Rights Internet Newsletter*.

2. Over 700 NGOs have accredited status with the U.N. Economic and Social Council. *Non-Governmental Organizations in Consultative Status with the Economic and Social Council* in 1978, U.N. Doc. E/1978/INF. 7 (1978).

3. See, e.g., *National Council of the Churches of Christ in the U.S.A., Human Rights in North America*, in 2 *Commission of the Churches on International Affairs, Human Rights and Christian Responsibility* 80-101 (1974). In the United States, a number of national NGOs have been at the forefront of protecting civil rights and civil liberties, e.g., the American Civil Liberties Union, the Center for Constitutional Rights, the National Association for the Advancement of Colored People, the NAACP Legal Defense and Education Fund, the American Jewish Committee, and the Lawyers' Committee for Civil Rights Under Law. For a description of the activities of Amnesty International's national sections, see T. Claudius & F. Stepan, *Amnesty International, Portrait Einer Organisation* 214-78 (3d ed. 1978). See generally *Human Rights Organizations & Periodicals Directory* (1977) (lists organizations and agencies active in civil liberties in U.S. and Canada); D. Weissbrodt, *The Influence of Interest Groups on the Development of United States Human Rights Policies* (unpublished

unofficial ombudsmen safeguarding human rights against governmental infringement, using such techniques as diplomatic initiatives,<sup>4</sup> reports,<sup>5</sup> public statements,<sup>6</sup> efforts to influence the deliberations of intergovernmental human rights bodies,<sup>7</sup> campaigns to mobilize public opinion,<sup>8</sup> and attempts to affect the foreign policy of some countries with respect to their relations with other countries that regularly commit human rights violations.<sup>9</sup>

If these nongovernmental human rights organizations wish to act effectively and responsibly, they must engage in fact-finding.

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manuscript on file with the authors) [hereinafter cited as D. Weissbrodt, *Influence of Interest Groups*].

4. See, e.g., International Committee of the Red Cross, *Annual Report 1977* (1978). This report includes accounts of diplomatic initiatives in Rhodesia/Zimbabwe, South Africa, and Indochina. *Id.* at 15-19.

5. See, e.g., Amnesty International, *An Amnesty International Report: Political Imprisonment in the People's Republic of China* (1978); A. Cook, *South Africa: The Imprisoned Society* (1974) (a publication of the International Defence and Aid Fund); S. Cronje, *Equatorial Guinea—The Forgotten Dictatorship* (1976) (Research Report No. 2 of the Anti-Slavery Society); International Commission of Jurists, *Final Report of Mission to Chile, April 1974, to Study the Legal System and the Protection of Human Rights* (1974); J. Mercer, *The Sahrawis of Western Sahara* (1979) (Minority Rights Group Report No. 40).

6. For example, Amnesty International (AI) issued 76 news releases on 38 countries from July 1, 1977 through June 30, 1978. AI, *Amnesty International Report 1978*, at 319 (1979).

7. B. Andemicael & E. Rees, *Non-governmental Organizations in Economic and Social Development* 24-25 (1975); Cassese, *How Could Nongovernmental Organizations Use U.N. Bodies More Effectively?*, *Universal Human Rights*, Oct.-Dec. 1979, at 73-75; Zuijdewijk, *The Right to Petition the United Nations Because of Alleged Violations of Human Rights*, 59 *Can. B. Rev.* 103 (1981). See also AI, *Allegations of Human Rights Violations in Democratic Kampuchea: UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: Statement Submitted by Amnesty International, a Non-governmental Organization in Consultative Status* (1978); International League for Human Rights, *Communication to the United Nations on a Consistent Pattern of Violations of Human Rights in the Republic of Guinea* (May 25, 1977) (unpublished mimeo on file with the authors).

8. See, e.g., AI, *1978 Argentina Campaign: Report and Evaluation* (May 4, 1979); AI, *1978 El Salvador Campaign: Report and Evaluation* (May 14, 1979).

9. Representatives from NGOs frequently appear before foreign policy committees of the U.S. Congress. See, e.g., Chile: *The Status of Human Rights and its Relationship to U.S. Economic Assistance Programs: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 3-13, 196-97 (1976); *Human Rights in Iran, Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 1-16, 63-69 (1976); *Human Rights in the Philippines: Report by Amnesty International: Hearing Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976); *Human Rights in South Korea: Implications for U.S. Policy: Hearings Before the Subcomms. on Asian and Pacific Affairs and on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 28-50, 54-69, 104-11 (1974); *Human Rights in Uruguay and Paraguay: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 86-108, 154-218 (1976).

The fact-finding methods of these organizations in some ways resemble those of investigative journalists; in other ways, these bodies function in a quasi-adjudicative mode. Human rights organizations usually collect information only at their central offices or secretariats but occasionally send fact-finding missions to perform on-site interviews and observations. The efforts and resources expended to gather information will vary from case to case, depending on how the NGO intends to use the desired data. Information obtained may appear in a mere diplomatic letter of inquiry, or may be published as a report to an international body such as the United Nations<sup>10</sup> or the Organization of American States.<sup>11</sup> NGOs differ significantly in membership, structure, size of staff, financial wherewithal, political focus, and location, but their fact-finding techniques do not vary greatly—except insofar as financial considerations limit their ability to employ expert staff and to send costly missions.

Despite all these differences, NGOs share the same basic purpose: to gather information which can be effectively mustered to influence the implementation of human rights by governments.<sup>12</sup> In order to inspire corrective efforts by governments, human rights organizations must demonstrate that their factual statements are true and thus constitute a reliable basis for remedial governmental policy.<sup>13</sup> Human rights organizations—as with any finder of fact—must pursue reliability through the use of generally accepted

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10. See Möller, *Petitioning the United Nations*, Universal Human Rights, Oct.-Dec. 1979, at 57; International Human Rights Law Group, *Petition to the United Nations Commission on Human Rights and Sub-Commission on Prevention of Discrimination and Protection of Minorities: Human Rights Violations in the Socialist Republic of Rumania* (June 27, 1979); National Conference of Black Lawyers, *Petition to the United Nations Commission on Human Rights and Sub-Commission on Prevention of Discrimination and Protection of Minorities: Human Rights Violations in the United States* (Dec. 1, 1978).

11. See, e.g., National Council of Churches, *Complaint Alleging a Violation of Human Rights in the United States of America* (submitted to the Inter-American Commission on Human Rights, Organization of American States, June 22, 1979).

12. See, e.g., Statute of Amnesty International, art. 2, reprinted in AI, *Amnesty International Report 1978*, at 299-300 (1979). "In Amnesty International, research is linked in an essential way to action . . . Information is the core of the work of the movement." AI, *Amnesty International Report 1978*, at 7 (1979).

13. Another reason why demonstrably reliable procedures for NGO fact-finding may be important is the potential for the use of such fact-finding in judicial tribunals. For example, an individual bringing a suit for damages against a torturer has a cause of action in the United States under the customary international law of human rights. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). The findings of an NGO on a State's use of torture, e.g., AI, *Report on Torture* (2d ed. 1975), perhaps could be introduced as evidence in such a suit.

procedures and by establishing a reputation for fairness and impartiality. Useful models for NGOs seeking to employ reliable fact-finding techniques may be found in the procedures of certain intergovernmental organizations (IGOs) which over the past century have gained considerable experience with fact-finding as a means of settling international disputes.<sup>14</sup>

There are, however, significant difficulties in establishing a rigid set of procedural rules for NGO fact-finding—particularly if those rules are derived from IGO fact-finding experience. NGOs undertake factual inquiries under circumstances that often differ from those under which IGOs operate. As compared to IGOs, NGOs have more limited financial resources, fewer commission members, less governmental cooperation, and different objectives. A single set of procedural rules may not adequately cover the many situations in which NGOs establish fact-finding inquiries. Such rigid rules are especially inappropriate when the NGO is providing an early warning mechanism for massive human rights violations. Nevertheless, the considerable fact-finding experience of IGOs should be considered and utilized by NGOs where appropriate.

This article concerns the role and importance of fact-finding by NGOs in the field of human rights. It begins with a basic overview of human rights organizations and their fact-finding work. In Part II, sources of international fact-finding standards are examined and the question of whether these standards are appropriate to the work of NGOs is considered. The procedures of intergovernmental and nongovernmental fact-finding bodies for carrying out the various phases of a fact-finding project are discussed in Part III, along with recommendations that NGOs consider certain procedures for their own fact-finding work. The article concludes with the sugges-

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14. See generally N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (1974); W. Shore, *Fact-Finding in the Maintenance of International Peace* (1970); Ermacora, *International Enquiry Commissions in the Field of Human Rights*, *Revue des Droits de l'Homme* 180, 181 (1968) [hereinafter cited as Ermacora, *Enquiry Procedures*]; Norris, *Observations In Loco: Practice and Procedures of the Inter-American Commission on Human Rights*, 15 *Texas J. Int'l L.* 46 (1980); van Boven, *Fact-Finding in the Field of Human Rights*, 1973 *Israel Y.B. on Human Rights* 93; *Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, Report of the Secretary-General on methods of fact-finding, U.N. Doc. A/5694 (1964) [hereinafter cited as *Secretary-General's Report*]. For an introduction and bibliography to human rights in general including NGOs, see Reynolds, *supra* note 1. See also *Checklist of Human Rights Documents (1976-present)* (continuation of the earlier *Checklist (1973-1976)*); W. Miller, *International Human Rights: A Bibliography 1970-1976* (1976).

tion that NGOs disclose in their final reports certain information concerning the fact-finding methodology employed during investigations of human rights problems.

## I. NGO FACT-FINDING

### A. *An Overview*

Among the most prominent international NGOs which regularly engage in fact-finding in the field of human rights are Amnesty International,<sup>15</sup> the Anti-Slavery Society,<sup>16</sup> the Commission of the Churches on International Affairs of the World Council of Churches,<sup>17</sup> the International Association of Democratic Lawyers,<sup>18</sup> the International Commission of Jurists,<sup>19</sup> the International Committee of the Red Cross,<sup>20</sup> the International Defense and Aid Fund,<sup>21</sup> the International Federation of Human Rights,<sup>22</sup> the Inter-

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15. In 1979 Amnesty International had 2283 adoption groups in 39 countries, 38 national sections, over 150 persons in the International Secretariat staff in London, and a budget of 1.5 million pounds per year. AI International Executive Committee, Report to the 12th International Council 1979, at 7, 33 (1979). See generally AI Handbook (1977); T. Claudius & F. Stepan, *supra* note 3; E. Larsen, *A Flame in Barbed Wire* (1978); J. Moreillon, *Le Comité International de la Croix-Rouge et la Protection des Détenus Politiques* 199-218 (1973); Scoble & Wiseberg, *Amnesty International: Evaluating Effectiveness in the Human Rights Arena*, 105 *Intellect* 79 (1976); Scoble & Wiseberg, *Human Rights and Amnesty International*, 413 *Annals* 116 (1974). See also 1977 Y.B. Int'l Org., Entry A0054 (Union of International Associations).

16. See Anti-Slavery Society, *Human Rights and Development, A 3-Year Research and Action Programme, 1978-1981* (undated) (unpublished manuscript on file with the authors).

17. See generally Commission of the Churches on International Affairs, *Human Rights and Christian Responsibility* 2-12 (1974); N. MacDermot, *Human Rights and the Churches* (1976); see also *Protection of Human Rights in Chile: Note by the Secretary-General*, 34 U.N. GAOR Annex (Agenda Item 12) at 21, U.N. Doc. A/34/583/Add. 1 (1979).

18. See generally International Association of Democratic Lawyers, IXth Congress of the International Association of Democratic Lawyers (1970); International Association of Democratic Lawyers, XXth Anniversary of the I.A.D.L. (1967). The IADL publishes the *Revue de Droit Contemporain* in Brussels.

19. See generally MacDermot, *The Work of the International Commission of Jurists*, 1 *Index on Censorship* 155 (1972). The general principles advocated by this NGO may be found in International Commission of Jurists, *The Rule of Law and Human Rights* (1966).

20. See generally D. Forsythe, *Humanitarian Politics: The International Committee of the Red Cross* (1977); J. Freymond, *Guerres, Révolutions, Croix-Rouge* (1976); J. Moreillon, *supra* note 15, *passim*; D. Tansley, *Final Report: An Agenda for Red Cross* (1975); M. Veuthey, *Guérilla et Droit Humanitaire* 48-61, 242-64, 319-33 (1976); Bissell, *The International Committee of the Red Cross and the Protection of Human Rights*, 1 *Revue des Droits de l'Homme* 255 (1968); Forsythe, *The Red Cross as Transnational Movement: Conserving and Changing the Nation-State System*, 30 *Int'l Org.* 607 (1976); International Committee of the Red Cross, *Le CICR, la Lique et la Rapport Tansley* (1977).

21. The International Defense and Aid Fund (Defense and Aid) is headquartered in



national League for Human Rights,<sup>23</sup> the Minority Rights Group,<sup>24</sup> Survival International,<sup>25</sup> and the World Peace Council.<sup>26</sup> NGOs collect most of their information by reviewing relevant laws, periodicals and submitted documents, interviewing occasional visitors, and corresponding with informants such as the families and friends of victims,<sup>27</sup> political parties opposing an oppressive regime,<sup>28</sup> and other repressed groups.

While the bulk of an NGO's information-gathering activity takes

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London and has regularly issued reports about human rights violations in South Africa and other African countries. See, e.g., R. Ainslie, *Masters and Serfs, Farm Labour in South Africa* (rev. ed. 1977); A. Cook, *supra* note 5; Defense and Aid, *The Sun Will Rise* (M. Benson ed. 1976); Defense and Aid, *Boss: The First 5 Years* (1975); Defense and Aid, *South African Prisons and the Red Cross Investigation* (1967) [hereinafter cited as *Defense and Aid, Prisons*]; A. Hepple, *Press Under Apartheid* (1974).

22. See Federation Internationale des Droits de l'Homme, *Bull. No. 2* (Dec. 1977-Feb. 1978).

23. See International League for Human Rights, *Annual Review (1976-1977)* (undated); Wiseberg & Scoble, *Human Rights as an International League*, in *Human Rights and World Order* 100 (A. Said ed. 1978). See also Wiseberg & Scoble, *The International League for Human Rights: the Strategy of a Human Rights NGO*, 7 *Ga. J. Int'l & Comp. L.* 289 (1977) [hereinafter cited as *Wiseberg & Scoble, The International League*]; 1977 *Y.B. Int'l Org.*, Entry A2205 (Union of International Associations).

24. Minority Rights Group is an international research and information group headquartered in London which publishes its research findings about minority groups suffering discrimination. See, e.g., H. Coombs, *Australia's Policy Toward Aborigines*, 1967-1977 (1978) (Minority Rights Group Report No. 35); J. Mercer, *supra* note 5; G. Schöpfli, *The Hungarians of Rumania* (1978) (Minority Rights Group Report No. 37); S. Steiner, *The Mexican Americans* (1979) (Minority Rights Group Report No. 39).

25. See generally *Survival International, Review* (Spring 1978).

26. See generally 1977 *Y.B. Int'l Org.*, Entry A3502 (Union of International Associations); see also *World Peace Council, Violations of Human Rights in Haiti, El Salvador, and Nicaragua* (undated).

27. See, e.g., AI, *Amnesty International Briefing: Guatemala* (1976); AI, *Political Imprisonment in the People's Republic of China* (1978); AI, *Report on Allegations of Torture in Brazil* (1972) [hereinafter cited as *Torture in Brazil*]; Juridical Sub-Commission of the International Commission of Enquiry into the Crimes of the Military Junta in Chile, *The Crimes of the Chilean Military Junta in the Light of Chilean Law and International Law* (1974); S. Steiner, *supra* note 24; *Argentina Beset by Arrest Queries*, *N.Y. Times*, Aug. 13, 1976, at 5, col. 1; *Plea for "Vanished" Chileans Arrested by Secret Police*, *Christian Science Monitor*, Nov. 16, 1977, at 18, col. 1; *Vance Wins Argentine Pledge on Nuclear Arms*, *N.Y. Times*, Nov. 22, 1977, at 3, col. 1. See also AI, *Prisoners of Conscience in the USSR: Their Treatment and Conditions* 2 (2d ed. 1980).

28. See J. Moreillon, *supra* note 15, at 217; *Arab Captives in Gaza Say Israelis Beat Them but Don't Use Torture*, *N.Y. Times*, July 8, 1977, § A, at 15, col. 5; *18 Days of Terror in an Iraqi Prison*, *Wash. Post*, June 2, 1979, § A, at 1, col. 2; *Physicist Says Argentina Jails Many Scientists*, *Wash. Post*, May 27, 1977, § A, at 26, col. 1; *You Don't Like Liberty?*, *Newsweek*, May 15, 1978, at 50, col. 1. See also AI, *Prisoners of Conscience*, *supra* note 27, at 2; *The Civil Rights Movement in the USSR*, *Int'l Comm'n Jurists Rev.*, Mar. 1970, at 13; notes 327-39 *infra* & accompanying text.

place in its central office, an organization may also elect to pursue an on-site investigation of a human rights problem. Over the past twenty years, NGOs have frequently sent fact-finding missions to areas in which human rights violations are alleged to be occurring.<sup>29</sup> Some of the missions are mounted to investigate specific human rights situations;<sup>30</sup> others are sent to observe trials of substantial international interest.<sup>31</sup> For example, during the period 1971-78 Amnesty International established 111 inquiry missions and 76 trial observer missions.<sup>32</sup> During the period 1971 through 1976 the International Commission of Jurists sent 42 trial observer missions<sup>33</sup> and 14 others.<sup>34</sup> Since World War II the International Committee of the Red Cross has sent representatives to visit over

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29. See, e.g., AI, *The Republic of Nicaragua: An Amnesty International Report* (1977); *Report of an Amnesty International Mission to the Republic of the Philippines* (2d ed. 1977) [hereinafter cited as *AI Mission to the Philippines*]; *Continued Absence of Democracy in Indonesia*, *Int'l Comm'n Jurists Bull.*, Sept. 1966, at 9. See generally Weissbrodt, *International NGOs*, *supra* note 1, at 300-04; Wiseberg & Scoble, *The International League*, *supra* note 23, at 309-10.

30. See, e.g., Association of the Bar of the City of New York, *Report of the Mission of Lawyers to Argentina April 1-7, 1979* (1979); W. Butler, J. Humphrey & G. Bisson, *The Decline of Democracy in the Philippines* (1977); Pierson-Mathy, *The International Fact-Finding Mission to Southern Africa*, *Rev. Contemp. L.*, No. 2, 1978, at 129; Association Internationale des Juristes Democrates, *Mission d'Enquête en Argentine et en Uruguay* (May 10-20, 1978); R. Goldman & D. Jacoby, *Report of the Commission of Enquiry to Mexico* (1978); Lawyers Committee for Human Rights, *International Human Rights Law Group & Washington Lawyers Committee for Civil Rights Under Law (Alien Rights Law Project), The Haitians in Miami: Current Immigration Practices in the United States* (Dec. 1978); B. Stephansky & D. Helfeld, *Denial of Human Rights in Paraguay: Report of Second Commission of Enquiry of the International League for Human Rights* (Dec. 1977); Unitarian Universalist Service Committee, *Human Rights in El Salvador—1978: Report of Findings of an Investigatory Mission* (1978) (report prepared by R. Drinan, J. McAward & T. Anderson).

31. See, e.g., Jacoby, *Le Mot du Secrétaire aux Observations Judiciaires, La Pratique des Observateurs Judiciaires Internationaux*, in *Federation International des Droits de l'Homme Bull.*, Dec. 1977-Feb. 1978, at 3; Martin-Achard, *Political Trials and Observers*, *Int'l Comm'n Jurists Rev.*, Apr.-June 1971, at 24; D. Weissbrodt, *International Observers at Trials of Human Rights Interest* (unpublished manuscript on file with the authors); D. Weissbrodt, *The Third Trial of Arnold Rampersaud*, Report by David Weissbrodt to the International Executive Committee of Amnesty International (1978).

32. AI, *Amnesty International Report 1978*, at 278-79 (1979); AI, *Amnesty International Report 1977*, at 318-20 (1977); AI, *Amnesty International Report 1975-1976*, at 196-97 (1976); AI, *Amnesty International Annual Report 1974/75*, at 137-39 (1975); AI, *Amnesty International Annual Report 1973-74*, at 77-78 (1974); AI, *Annual Report 1972-73*, at 34, 69, 88 (1973); AI, *Annual Report 1971-72*, at 58 (1972); AI, *Annual Report 1970-71*, at 17-19 (1971).

33. International Commission of Jurists, *Report on the Activities of the International Commission of Jurists 1971-1977*, at 31-35 (1977).

34. *Id.* at 37-38.

300,000 political detainees in 72 countries.<sup>35</sup> Between 1952 and 1972 the International Association of Democratic Lawyers sent 115 missions.<sup>36</sup>

Of course, some sources to which NGOs look for information are more reliable than others. NGOs employ a variety of techniques to determine the accuracy of information supplied to them, such as looking for circumstances which might cause the informant to be biased and testing for inconsistencies by careful questioning. In many cases, NGOs will attempt to corroborate the information acquired through their fact-finding efforts. Statements of an accused government may lend credence to allegations of human rights violations.<sup>37</sup> Corroboration is also facilitated by exchanges of information among NGOs with different sources of information and areas of expertise.<sup>38</sup>

NGOs use the results of these fact-finding efforts in different ways. The human rights organization may gather the relevant material and make a diplomatic effort to raise any apparent problem with the offending government.<sup>39</sup> Persistent silence in response to such NGO requests is often taken by the organizations as significant, if not as tantamount to an admission of guilt.<sup>40</sup> Governmental replies are carefully analyzed to determine whether they may contain admissions to part or all of the allegations.<sup>41</sup>

Some organizations, such as the International Committee of the Red Cross, stress diplomatic initiatives with governments, although the Red Cross does disseminate information about the places it visits, the number of prisoners seen, and the dates of its

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35. See International Committee of the Red Cross, *Le CICR, la Lique et la Rapport Tan-sley*, supra note 20, at 38. Between 1973 and 1977, ICRC delegates visited prisons in 46 countries. *Id.* at 39. See also J. Moreillon, supra note 15, at 189-98.

36. International Association of Democratic Lawyers, *Rappel Chronologique des Principales Missions* (undated).

37. See, e.g., *Argentina Admits It Holds Missing Rights Leader*, Wash. Post, Sept. 22, 1977, § A, at 24, col. 1.

38. See Paraguay, *Int'l Comm'n Jurists Rev.*, Dec. 1971, at 13; Weissbrodt, *International NGOs*, supra note 1, at 314; Note, supra note 1, at 488.

39. See, e.g., AI, *Report of an Amnesty International Mission to Sri Lanka 9-15 January 1975*, at 5 (1976) [hereinafter cited as *AI Mission to Sri Lanka*].

40. See, e.g., *Regulations of the Inter-American Commission on Human Rights*, O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 26, art. 51(1) (1967); cf. AI, *Political Imprisonment in the People's Republic of China ix-x* (1978) (Although AI did not take silence by the Chinese government as an admission of guilt, it did not publish its report until after the Chinese refused to comment thereon.).

41. See, e.g., *AI Mission to the Philippines*, supra note 29, at 8.

visits.<sup>42</sup> Other organizations, such as Amnesty International, the International Commission of Jurists, and the International League for Human Rights, put the results of their fact-finding efforts to use through a wide range of techniques: (1) diplomatic contacts,<sup>43</sup> (2) limited or massive letter-writing campaigns,<sup>44</sup> (3) issuance of limited circulation reports,<sup>45</sup> (4) distribution of press releases,<sup>46</sup> (5) publication of detailed reports in pamphlet or book format,<sup>47</sup> (6) printing of brief statements in organization periodicals<sup>48</sup> or annual reports,<sup>49</sup> (7) filing of communications with or lobbying international human rights bodies,<sup>50</sup> (8) testimony before United Nations

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42. See, e.g., International Committee of the Red Cross, Annual Report 1977, at 13-15 (1978) (list of prisoners in Ethiopian hands).

43. See, e.g., Afghanistan—AI Meets With Vice Premier, in Amnesty Action, Jan., 1979, at 4. The International League for Human Rights sent the names of persons missing during the 1974 Cyprus Civil War to President Makarios and the Turkish government, eliciting a government response. International League for Human Rights, Annual Review 1976-1977, at 15 (1977).

44. AI conducted an El Salvador campaign during October-December 1978. See AI, El Salvador Campaign Circular 1: Campaign Outline (July 5, 1978); AI, 1978 El Salvador Campaign: Report and Evaluation (May 14, 1979). See also note 8 *supra* & accompanying text.

45. AI often distributes material marked "INTERNAL (for AI members only)."

46. Amnesty International distributed 76 news releases in 1977-78, 70 in 1976-77, and 46 in 1975-76. AI, Amnesty International Report 1978, at 318 (1979); AI, Amnesty International Report 1977, at 344-47 (1977); AI, Amnesty International Report 1975-1976, at 198-200 (1976).

47. See, e.g., AI, Human Rights Violations in Ethiopia (1978); AI, Indonesia: An Amnesty International Report (1977); W. Butler, J. Humphrey & G. Bisson, *supra* note 30; D. Fox, Human Rights in Guatemala: Report of a Mission to Guatemala in June, 1979, on Behalf of the International Commission of Jurists (1979); International Defense and Aid Fund, South Africa: The Boss Law (1971); R. Goldman & D. Jacoby, Report of the Commission of Inquiry to Mexico (Dec. 1978) (report prepared for the International League for Human Rights).

48. Amnesty International has several periodicals, including Amnesty Action and Amnesty International Newsletter. The International Commission of Jurists Review contains a section entitled "Human Rights in the World," as well as commentaries and articles. See also Human Rights Bulletin (published by the International League for Human Rights), and Flash (published by the World Confederation of Labor).

49. Amnesty International devotes a large section of its annual report to "Prisoners and Human Rights Country by Country." See, e.g., AI, Amnesty International Report 1978, 27-277 (1979). The International League for Human Rights also summarizes its results country by country. See, e.g., International League for Human Rights, Annual Review 1976-77 (1977).

50. See Domb, Who is a "Victim" of a Violation of Human Rights?, 1975 Israel Y.B. on Human Rights 181; see, e.g., Situation of Human Rights in Nicaragua, U.N. Doc. E/CN.4/Sub. 2/426 at 14-129 (1979). The National Council of the Churches of Christ recently submitted a complaint to the Inter-American Commission on Human Rights regarding United States treatment of Haitian refugees who seek political asylum. National Council of the Churches of Christ, Complaint Alleging a Violation of Human Rights in the United States of America (June 22, 1979).

organs<sup>51</sup> and national legislative bodies,<sup>52</sup> (9) lobbying certain governments to raise human rights issues with other governments,<sup>53</sup> (10) lobbying governments or corporations to take trade, aid, or other measures against violating nations,<sup>54</sup> and (11) a combination of these and other techniques.<sup>55</sup>

The way an organization uses the results of its fact-finding will depend less upon the reliability of its fact-finding procedures than it will upon the financial and organizational strength of the NGO. For example, with a staff of two or three in New York and with relatively independent affiliates in thirty countries, the International League for Human Rights can issue press releases, distribute reports to a limited number of people, and monitor events at the United Nations, but it cannot always engage in the range of activi-

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51. See, e.g., AI, *Allegations of Human Rights Violations in Democratic Kampuchea*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Aug. 1978); International League for Human Rights, *Communication to the United Nations on a Consistent Pattern of Violations of Human Rights in the Republic of Guinea* (1977). In 1976 the League also submitted a 73-page complaint to the U.N. Human Rights Commission regarding violations in India. International League for Human Rights, *Annual Review 1976-1977*, at 13 (1977).

52. See, e.g., *Human Rights in the Philippines: Report by Amnesty International: Hearing Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976). The International League for Human Rights presented a proposal for the advancement of freedom of information in Congressional hearings held by Senator Jackson in 1976. International League for Human Rights, *Annual Review 1976-1977*, at 4 (1977).

53. A general effort along these lines was made in February 1977, when the International League for Human Rights submitted a 75-page report to President Carter. International League for Human Rights, *Report of the Conference on Implementing a Human Rights Commitment in U.S. Foreign Policy* (Mar. 4, 1977). More specifically, the League petitioned the U.S. State Department to investigate a list of persons missing in the 1974 Cyprus Civil War. International League for Human Rights, *Annual Review 1976-1977*, at 15 (1977). Additional examples may be found in D. Weissbrodt, *Influence of Interest Groups*, *supra* note 3, at 7.

54. Amnesty International has studied the use of economic pressures to achieve human rights results. See, e.g., AI, *Report on Amnesty International Seminar "Human Rights and Economic Pressures"* (Apr. 3, 1978) (seminar held in London on Jan. 28-29, 1978). See also Harkin, *Human Rights and Foreign Aid: Forging an Unbreakable Link*, in *Human Rights and U.S. Foreign Policy: Principles and Applications* (P. Brown and D. MacLean eds. 1979); D. Weissbrodt, *Influence of Interest Groups*, *supra* note 3, at 4-5.

55. An example of action involving a combination of techniques is the Amnesty International 1978 Argentina campaign. The objective of the campaign was to highlight human rights violations in Argentina in conjunction with the June 1978 World Cup Soccer Championship played in that country. The techniques included media coverage of the human rights situation, public meetings, demonstrations, enlisting the support of the soccer players, and bringing pressure upon the Argentinian government from a wide range of groups. AI, *1978 Argentina Campaign: Report and Evaluation* (May 4, 1979).

ties open to NGOs with more members and resources.<sup>56</sup> The Anti-Slavery Society and the International Association of Democratic Lawyers, among many others, are similarly limited in their activities. Some organizations lack the finances even to attempt original fact-finding work and instead rely entirely upon data gathered by other NGOs.<sup>57</sup> Nevertheless, most NGOs engage in fact-finding and their credibility depends in large measure upon the reliability of the facts obtained through such efforts. The reliability of an NGO's information depends, in turn, on the methods used to obtain such information.

*B. Should NGOs Adopt Formal Fact-Finding Procedures?  
—Some Considerations*

NGOs have not formally adopted any standard procedure for fact-finding. A paragraph or two is sometimes found in the introduction to a report outlining some aspect of the procedures used.<sup>58</sup> A reference to an evidentiary standard may arise in the narrative of events<sup>59</sup> and the schedule of an on-site visit may, on occasion, be described.<sup>60</sup> Some NGOs are so devoid of expertise, time, and resources that they lack the ability to develop any regular procedures.<sup>61</sup> Instead, they live from press release to hastily drawn report, without time for methodology. This lack of uniform fact-finding procedures is a problem because much of the monitoring and reporting of human rights violations in the world is done by NGOs.<sup>62</sup>

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56. See Wiseberg & Scoble, *The International League*, supra note 23, at 308.

57. See D. Weissbrodt, *Influence of Interest Groups*, supra note 3, at 31.

58. See, e.g., *International Commission of Jurists, Uganda & Human Rights* 5 (1977) (reports to the U.N. Commission on Human Rights). Frequently, the thorough human rights fact-finding efforts of rapporteurs appointed by U.N. bodies also lack adequate attention to methodology and procedure. See, e.g., *Study of the Human Rights Situation in Equatorial Guinea*, U.N. Doc. E/CN.4/1371 (1980).

59. See *International Commission of Jurists, Report of the Committee of Enquiry into Events in Bizerta, Tunisia* 7, 9, 16 [hereinafter cited as *Bizerta Report*]. See also Ermacora, *Enquiry Procedures*, supra note 14, at 202.

60. See *Bizerta Report*, supra note 59, at 5-8.

61. See D. Weissbrodt, *Influence of Interest Groups*, supra note 3, at 20-26.

62. See Claude, *Reliable Information: The Threshold Problem for Human Rights Research*, 6 *Human Rights* 169, 174-75 (1977); Franck & Cherkis, *The Problem of Fact-Finding in International Disputes*, 18 *W. Res. L. Rev.* 1483, 1511 (1967); Hazzard, *The League of Frightened Men*, *The New Republic*, Jan. 19, 1980, at 17; Rodley, supra note 1, at 120, 124, 138-47.

Most NGO human rights fact-finding has concentrated on civil and political rights, but violations of economic, social, and cultural rights also require factual investigation. See Al-

In determining the extent to which they ought to establish regular fact-finding procedures, NGOs must take into account several competing considerations. On the one hand, fact-finding procedures may add to the respect NGO findings will be accorded by criticized governments, intergovernmental human rights bodies, and by world public opinion.<sup>63</sup> Furthermore, use of a standard set of procedures may ensure that results obtained by different offices and missions within the same organization will be consistent and comparable. Fact-finding guidelines may also assist the NGO in obtaining the cooperation of governments and witnesses to the extent they can be assured of being treated fairly.

On the other hand, strict fact-finding rules may impede the NGO in reaching the sorts of conclusions necessary in certain situations, where the NGO "knows" human rights violations are occurring, but cannot "prove" them.<sup>64</sup> It is not enough that an organization's intentions are laudable; it must also reach concrete factual conclusions. If the procedures prevent conclusions and thus action in too many cases, the NGO ultimately will lose adherents and influence. There are instances where access to first-hand information is so limited that neither general nor particular allegations of

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ston, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 Colum. J. Transnat'l L. 79, 101-05 (1979); Cassese, *supra* note 7.

Legislative bodies have also engaged in human rights fact-finding. See Salzberg, *Monitoring Human Rights Violations: How Good is the Information?*, in *Human Rights and U.S. Foreign Policy* 173 (P. Brown & D. MacLean eds. 1979). In addition, fact-finding commissions have been used on matters of national concern. See H. Clokier & J. Robinson, *Royal Commissions of Inquiry* (1937); Corman, *The Riot Commission's Report*, 9 Ariz. L. Rev. 347 (1968); Franck & Cherkis, *supra*, at 1512-19; Lockwood, *A History of Royal Commissions*, 5 Osgoode Hall L. J. 172, 200-07 (1967); Sloane, *Presidential Boards of Inquiry in National Emergency Disputes*, 18 Lab. L.J. 665, 674-75 (1967).

63. See Franck & Cherkis, *supra* note 62, at 1523-24 (1967). It has been argued that when a State refuses to cooperate in an inquiry, which is the usual case, "the enquiry is condemned in advance to lose the character of an objective investigation." Ermacora, *Enquiry Procedures*, *supra* note 14, at 204. Under these circumstances, it is important to have procedures which will guarantee impartiality and thoroughness.

64. Amnesty International's Urgent Action Network handles this type of situation. See, e.g., AI, *Amnesty International Handbook* 15-16 (1977); AI USA, *Companion to the Amnesty International Handbook* 5 (2d ed. 1979). Urgent action appeals, pleas by AI to the allegedly offending government to take immediate action, are frequently used in emergency situations where there is an imminent risk of torture or execution. Often there is not time for AI to obtain definite "proof" as most tortures and deaths occur within hours or days of an individual's arrest. See, e.g., AI, *Urgent Action Notice* (Apr. 26, 1979) (kidnapping and detention of six persons in Mar del Plata, Argentina); AI, *Campaign for the Abolition of Torture*, *Urgent Action Notice* (July 11, 1977) (abduction of Father Silva Iribarne-Garay in Buenos Aires).

human rights violations can be proven with the desired exactitude.<sup>65</sup> In this type of situation, a quasi-judicial model of fact-finding would hamstring NGO activity. A human rights NGO does not serve its underlying purpose by responding with silence to allegations of torture or illegal detention because its investigation fails to meet a judicial standard of proof.

Moreover, fact-finding procedures might limit the sort of flexibility upon which NGOs have come to rely, particularly in situations in which life and liberty are endangered.<sup>66</sup> For example, if a rule were established prohibiting comment by a mission upon a human rights problem while the mission remained in the country under investigation,<sup>67</sup> the mission members might feel constrained to avoid comment even though lives could be saved. A government might use such a procedural guideline to exploit even the most innocent remark by an NGO mission member as a pretext for expulsion. Similarly, procedures requiring that information be received only in open session at which the government is represented might seriously hamper a mission's work. Indeed, even a procedural guideline requiring the mission to identify sources of information would discourage communications from repressed groups or might expose witnesses to a greater risk of retaliation.<sup>68</sup>

Ignoring these difficulties, the International Law Association at its 1980 meeting in Belgrade adopted "by consensus a set of minimal procedures to protect the integrity of human rights fact-finding by nongovernmental organizations."<sup>69</sup> The rules were based upon a study prepared by Thomas Franck and Scott Fairley of New York University.<sup>70</sup> It is remarkable that these proposed

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65. See, e.g., AI, Indonesia 11, 31-40 (1977); AI, Islamic Republic of Pakistan 15 (1977); AI, Political Imprisonment in the People's Republic of China 28-31 (1978); AI, Political Imprisonment in South Africa 37-40 (1978).

66. Cf. Comment, Negotiation by International Bodies and the Protection of Human Rights, 7 Colum. J. Transnat'l L. 90, 131 (1968) (disadvantages of formal procedures and strict rules of admissibility in dealing with human rights problems).

67. See, e.g., AI, Rules to be Observed by All Persons Charged with Attending Trials or Carrying Out Other Missions on Behalf of Amnesty International, rule 7 (Dec. 16, 1975).

68. See, e.g., AI, Report of an Amnesty International Mission to Argentina 6-15 November 1976, at 6 (1977) [hereinafter cited as AI Mission to Argentina]; AI, Violations of Human Rights and Fundamental Freedoms in the Democratic Republic of Afghanistan 4 (1979).

69. Current Development, The Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions, 75 Am. J. Int'l L. 163, 163 (1981) [hereinafter cited as Belgrade Rules].

70. Id. at 163 n.1; Franck & Fairley, Procedural Due Process in Human Rights Fact-find-



"rules" for *nongovernmental* organizations were founded upon a study which deals almost exclusively with the fact-finding experience of *intergovernmental* organizations. The study fails to note the unique problems facing NGOs that are set forth above. While the International Law Association is an NGO itself, it lacks substantial experience in fact-finding. Neither the Franck-Fairley study nor the Belgrade Rules appear to recognize the significant difficulties in imposing rigid procedural prescriptions upon the fact-finding work of NGOs.

To make matters worse, Franck and Fairley adopt, in significant respects, an unfortunately narrow, adversarial model that does not fit much of the fact-finding efforts of intergovernmental organizations, any more than it suits the efforts of NGOs. Franck and Fairley draw a useless distinction between prosecutorial marshalling of evidence—about which they have little to suggest—and adjudicative fact-finding limited by numerous safeguards.<sup>71</sup> Such a distinction faithfully reflects the contrast between the roles of the prosecutor and the judge in the United States. But it also reflects a failure to understand the efforts of most international fact-finding bodies. For example, how could one classify under the Franck and Fairley dichotomy the fact-finding role of the many experts who make direct contacts with governments for the U.N., the International Labor Organization or NGOs?

The Belgrade Rules evidence a slight improvement over the limits of the Franck-Fairley study, but still bear far too much of an adversarial bias. For instance, the Belgrade Rules in most situations mandate public testimony with an opportunity for questioning by the State involved.<sup>72</sup> Even if the organization obtains the assurances of protection for witnesses, which the Belgrade Rules propose,<sup>73</sup> such an opportunity for questioning by States is not "ordinary," but rare for IGO fact-finding and almost without precedent for NGOs.<sup>74</sup> The realities facing NGO fact-finding and the

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ing by International Agencies, 74 Am. J. Int'l L. 308 (1980).

71. Franck & Fairley, *supra* note 70, at 310.

72. Belgrade Rules, *supra* note 69, at 164, rule 14.

73. Although the Belgrade Rules in one provision appear to afford the State concerned ample opportunity to confront complaining witnesses, *id.*, at 164, rule 14, thereby chilling communications from repressed groups, the Rules also suggest that "[t]he factfinding mission may withhold information which, in its judgment, may jeopardize the safety or well-being of those giving testimony, or of third parties, or which in its opinion is likely to reveal sources." *Id.*, rule 17.

74. See notes 411-18 & 439-49 *infra* & accompanying text.

risks to informants make such a requirement appear naive. Furthermore, it is inappropriate to propose an adversarial model wherein only the State is represented. Human rights victims will not be represented and the fact-finding commission cannot adopt the passive role of a judge in a common law system.

From the foregoing considerations, it is clear that NGOs might benefit from the adoption of certain fact-finding rules, but should be left free to choose those procedures they wish to follow, so as to leave intact that flexibility and freedom of action vital to an NGO's work. There are quite a few procedural models, primarily in use by governmental bodies, from which to choose. Hence, it might be helpful to examine briefly these models and the organizations which employ them, and to discuss the appropriateness of applying governmental fact-finding rules to the work of an NGO. Further, there is much in the Belgrade Rules that may be taken as a distillation of the experience of intergovernmental fact-finding and thus may be useful for NGOs to study and adopt, where practicable.

## II. SOURCES OF INTERNATIONAL FACT-FINDING STANDARDS

Assuming that it is appropriate to suggest some procedural principles for NGO fact-finding or at least to compare NGO reports with the extant standards, it must be determined which set of standards should be applied. Since NGOs have not developed discernable standard fact-finding practices, one has very little choice but to refer to the standards based on the experience of governments and IGOs, such as the Hague Convention for the Pacific Settlement of International Disputes, the United Nations model rules for human rights bodies, and the International Labor Organization rules.

### A. *The Hague Convention of 1907: The First International Fact-Finding Standard*

The Hague Convention of 1907 is one of the most thorough codifications of procedures for bilateral inquiry strictly limited to fact-finding.<sup>75</sup> The Hague Convention of 1907 provides that a commission of inquiry can be constituted only by an agreement be-

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75. See generally N. Bar-Yaacov, *supra* note 14, at 20-108; Ermacora, *Enquiry Procedures*, *supra* note 14, at 182-83; Franck & Cherkis, *supra* note 62, at 1491-92; W. Shore, *supra* note 14, at 12-28.

tween two disputing States.<sup>76</sup> The Convention envisioned that inquiry would be limited to investigation of disputes "arising from a difference of opinion on points of fact" but "involving neither honor nor vital interests."<sup>77</sup> The exact nature of the inquiry is left to negotiation between the disputing States who together determine the composition of the commission, the powers of the commissioners, the facts to be examined, when and where the commission will sit, which languages will be used and any other rules of procedure the States wish to impose.<sup>78</sup> In order to encourage the use of inquiry, the 1907 Hague Convention provided model rules of procedure governing the nomination by the parties of special agents or counsel,<sup>79</sup> the communication of statements of facts and documents by each party,<sup>80</sup> requests by the commission for information,<sup>81</sup> the production of witnesses,<sup>82</sup> the examination of witnesses,<sup>83</sup> the secrecy of the commission meetings,<sup>84</sup> the closure of the proceedings,<sup>85</sup> the majority vote<sup>86</sup> and right to dissent,<sup>87</sup> the public reading of the decision,<sup>88</sup> and the allocation of expenses.<sup>89</sup> The narrow scope of "inquiry" conceived by the Hague Convention is re-emphasized by the provision in article 35 that the "report of the Commission is limited to a statement of facts, and has in no way the character of an Award."<sup>90</sup>

Even though use of the Hague model for inquiry was limited to several naval disputes,<sup>91</sup> the Hague Convention continues to serve as a model of procedure for inquiry commissions that undertake to make recommendations as well as find facts.<sup>92</sup> The functional lim-

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76. Hague Convention for the Pacific Settlement of International Disputes of 1907, art. 10, 36 Stat. 2199, T.S. No. 536 [hereinafter cited as Hague Convention of 1907].

77. *Id.* art. 9.

78. *Id.* arts. 10, 12, 45, 57.

79. *Id.* art. 14.

80. *Id.* art. 19.

81. *Id.* art. 22.

82. *Id.* arts. 23-25.

83. *Id.* arts. 26-28.

84. *Id.* art. 30.

85. *Id.* art. 32.

86. *Id.* art. 30.

87. See *id.* art. 33.

88. *Id.* art. 34.

89. *Id.* art. 36.

90. *Id.* art. 35.

91. See W. Shore, *supra* note 14, at 18 (1970); Kaufman, *The Necessity for Rules of Procedure in Ad Hoc United Nations Investigations*, 18 *Am. U.L. Rev.* 739, 741-43 (1969).

92. See generally N. Bar-Yaacov, *supra* note 14, at 109-246; W. Shore, *supra* note 14, at

its of these commissions, even if expanded beyond inquiry to include mediation and conciliation, continue to be determined by the disputing State parties in accord with article 10 of the Hague Convention.<sup>93</sup>

### B. *The United Nations Fact-Finding Rules*

A second form of inquiry has been developed by the League of Nations,<sup>94</sup> the United Nations<sup>95</sup> and other IGOs.<sup>96</sup> When inquiry is undertaken by international organizations, the appointment of a commission does not depend on joint initiative of the parties to a dispute.<sup>97</sup> The State requesting an inquiry by the organization

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15-22, 32-36; Leurdijk, *Fact-Finding: Its Place in International Law and International Politics*, 1967 *Nederlands Tijdschrift voor Internationaal Recht* 141, 154-58; Secretary-General's Report, supra note 14, at 23-33, 60-64. Professor Emacora suggested in 1968 that both the U.N. and NGOs adopt the Hague rules. Eremacora, *Enquiry Procedures*, supra note 14, at 205.

93. W. Shore, supra note 14, at 15-22, 32-36. The voluntary resort to enquiry by a party State and the non-binding character of the commission finding under the Hague rules are inappropriate to human rights investigation. "To conform to such rules of procedure would be tantamount to a concession that human rights are purely a domestic matter . . . ." Kaufman, supra note 91, at 743.

94. See W. Shore, supra note 14, at 22-26; Secretary-General's Report, supra note 14, at 37-47; Williams, *The Pan American and League of Nations Treaties of Arbitration and Conciliation*, 1929 *Brit. Y.B. Int'l L.* 14.

95. See generally N. Bar-Yaacov, supra note 14, at 247-321; Carey, *Procedures for International Protection of Human Rights*, 53 *Iowa L. Rev.* 291, 315-16 & n.128 (1967) (U.N. Trusteeship on-site visits) [hereinafter cited as Carey, *Human Rights Procedures*]; Darwin, *Factfinding and Commissions of Inquiry*, in David Davies Memorial Institute of International Studies, *International Disputes* 159, 172-76 (1972); Secretary-General's Report, supra note 14, at 69-128. See also J. Carey, *U.N. Protection of Civil and Political Rights* (1970); Carey, *United Nations Scrutiny of South African Prisons*, 1 *Revue de Droits de l'Homme* 531 (1968) [hereinafter cited as Carey, *U.N. Scrutiny*]; Note, *UN Fact-Finding as a Means of Settling Disputes*, 9 *Va. J. Int'l L.* 154, 178-82 (1969).

96. See generally J. Ralston, *The Law and Procedure of International Tribunals* 43-44 (1926); A. Robertson, *Human Rights in Europe* (2d ed. 1977); Foster, *Fact Finding and the World Court*, 1969 *Can. Y.B. Int'l L.* 150, 153-54; Leurdijk, supra note 92, passim; Robertson, "Enquêtes" en Matière le Droits de l'Homme, in *L'Inspection Internationale* 501 (G. Fischer & D. Vignes eds. 1976); Monconduit, *Étude Fonctionnelle des Organes Européens de Protection Internationales des droits de l'Homme: La Fonction d'Enquête et d'Instruction*, 2 *Revue de Droits de l'Homme* 208 (1969); Comment, supra note 66, passim.

97. The departure by international organizations from the Hague bilateral approach to inquiry is clearly illustrated in the establishment by the U.N. General Assembly of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories. G.A. Res. 2443, 23 U.N. GAOR Supp. (No. 18) at 50, U.N. Doc. A/RES/2443, at 2 (1969). Not only did the State under investigation have no hand in the formation of the Committee, but the Committee was composed of two States that had no diplomatic relations with Israel and one State whose relations with Israel were limited. *Id.*

need not be directly harmed or even a party to the dispute.<sup>98</sup> In fact, since the subject State has only indirect and often very little control over the membership, terms of reference, and mode of operation of the commission, the consent and cooperation of subject States have not regularly been required for the establishment of inquiry commissions.<sup>99</sup> Nevertheless, the subject State may be consulted and have some influence on how the inquiry proceeds.

The League of Nations, acting under the impetus of the Bryan Treaties,<sup>100</sup> expanded the role of fact-finding commissions to include conciliation, provided for the mandatory submission of disputes to inquiry,<sup>101</sup> and authorized the publication of the conciliation commission's report. These procedural developments reflected a modification of the traditional concept of State sovereignty by recognizing collective responsibility for the maintenance of peace. Inquiry no longer served merely to settle facts disputed by two States, but also to provide a basis for collective action by international bodies. In fact, the initiation of fact-finding and the publication of a report became in themselves the most important action of the international body.<sup>102</sup>

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98. See N. Bar-Yaacov, *supra* note 14, at 292; W. Shore, *supra* note 14, at 50-60.

99. See, e.g., Ermacora, *Enquiry Procedures*, *supra* note 14, at 188; van Boven, *supra* note 14, at 107-15. Although the League of Nations enquiry commissions were never appointed without the consent of the concerned parties, see W. Shore, *supra* note 14, at 25, the U.N. has conducted extended enquires in South Africa, Israel, and Chile over the objections of those governments. Communications regarding human rights violations may be made under Economic and Social Council Resolution 1503, E.S.C. Res. 1503, 48 U.N. ESCOR Supp. (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970), but the express consent of the concerned State must be obtained before they can be the subject of thorough on-site investigations. Direct contacts by a U.N. official with the government of the concerned State under resolution 1503 have permitted some related fact-finding. E.g., Study of the Human Rights Situation in Equatorial Guinea, U.N. Doc. E/CN.4/1371, Annex I (1980); see notes 159 & 164-65 *infra* & accompanying text.

The ILO's experience in fact-finding demonstrates the crippling effect of a consent requirement. The Fact-Finding and Conciliation Commission on Freedom of Association has had only five cases referred to it in over 20 years because government consent was required. The Governing Body's Committee on Freedom of Association, which can investigate complaints from any country regardless of consent, has handled over 850 complaints since 1951. International Labour Office, 193rd Report of the Committee on Freedom of Association, I.L.O. Doc. GB.209/6/9, at 3 (1979). See also W. Shore, *supra* note 14, at 141-44; van Boven, *supra* note 14, at 111-12. For a discussion of ILO procedures, see notes 137-92 *infra* & accompanying text.

100. See W. Shore, *supra* note 14, at 19-22; Franck & Cherkis, *supra* note 62, at 1492-93; Secretary General's Report, *supra* note 14, at 29-33.

101. See W. Shore, *supra* note 14, at 134-35.

102. See W. Shore, *supra* note 14, at 137. The international community, including the League of Nations and the United Nations, has been slow to proceed from fact-finding to

Inquiries have been undertaken by the United Nations pursuant to article 13 of the U.N. Charter, which provides that the General Assembly "shall initiate studies and make recommendations for the purpose of . . . the realization of human rights and fundamental freedoms."<sup>103</sup> Article 14 states that "the General Assembly may recommend measures for the peaceful adjustment of any situation. . . ."<sup>104</sup> Article 34 authorizes the Security Council to "investigate any dispute, or *any situation* which might lead to international friction or give rise to a dispute."<sup>105</sup> U.N. inquiry has thus come to be used not only to settle disputes between two States, but to adjust "situations" existing within single countries. The scope of inquiry has also been expanded occasionally to include an investigation of all aspects of a dispute—legal, political, or factual<sup>106</sup>—and the formulation of recommendations in addition to findings.<sup>107</sup>

The General Assembly,<sup>108</sup> the Security Council,<sup>109</sup> the Secretary-General,<sup>110</sup> and the U.N. Commission on Human Rights<sup>111</sup> have undertaken fact-finding primarily on an ad hoc basis.<sup>112</sup> Some U.N.

coercive action. See D. Weissbrodt, *Case Studies of Trade and Aid Sanctions* 1-7 (1979).

103. U.N. Charter art. 13.

104. *Id.* art. 14.

105. *Id.* (emphasis added); see W. Shore, *supra* note 14, at 100-03.

106. See generally Secretary-General's Report, *supra* note 14, at 65-127.

107. See notes 519-41 *infra* & accompanying text; see, e.g., W. Shore, *supra* note 14, at 50-51, 57-58, 60.

108. See Secretary-General's Report, *supra* note 14, at 75-101; see, e.g., Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, 31 U.N. GAOR Supp. (No. 35) at 1, U.N. Doc. A/31/35 (1976); Report of the Sub-Committee on the Situation in Angola, 16 U.N. GAOR Supp. (No. 16) at 6, U.N. Doc. A/4978 (1961).

109. See Secretary-General's Report, *supra* note 14, at 102-21.

110. *Id.* at 122-27.

111. See, e.g., Interim Report of the *Ad Hoc* Working Group of Experts Prepared in Accordance with Resolution 19 (XXIX) of the Commission on Human Rights, U.N. Doc. E/CN.4/1135 at 1 (1974); Report of the *Ad Hoc* Working Group of Experts on the Investigation Requested in Resolution 21 (XXV) of the Commission on Human Rights, U.N. Doc. E/CN.4/1020 at 2 (1970); Report of the Economic and Social Council, Protection of human rights in Chile, U.N. Doc. A/33/331 at 1, Annex I (1978); Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Human Rights in Democratic Kampuchea, U.N. Doc. E/CN.4/1335 at 1 (1974). For discussion of the legality and authority of ad hoc working groups established by the U.N. Commission on Human Rights, see Kaufman, *supra* note 91, at 745-50.

112. The International Court of Justice has also engaged in fact-finding on an ad hoc basis. The Permanent Court of International Justice undertook an on-site visit in The Diversion of Water from the Meuse, 1937 P.C.I.J., Ser. A/B, No. 70, at 9. See also I.C.J. Stat. art. 22, para. 1; 1 L. Gross, *The Future of the International Court of Justice* 65 (1976); Hudson, *Visits by International Tribunals to Places Concerned in Proceedings* 31 Am. J.

commissions of inquiry have adopted written procedures modeled on the rules of their parent bodies and previous commissions,<sup>113</sup> while some commissions have relied on no written rules.<sup>114</sup> The U.N. Fact-Finding Mission to South Vietnam was an ad hoc commission that adopted 21 rules of procedure and described in detail the method of its operation.<sup>115</sup> The rules adopted dealt with the duties of officers,<sup>116</sup> quorum and voting requirements,<sup>117</sup> the terms of reference,<sup>118</sup> the type of evidence that would be admitted,<sup>119</sup> the manner of accepting petitions,<sup>120</sup> the process of hearing witnesses,<sup>121</sup> the conduct of on-the-spot investigations,<sup>122</sup> and the authority of commission members to make public statements.<sup>123</sup>

In 1970 the Secretary-General issued Draft Model Rules of fact-finding procedure for U.N. bodies dealing with violations of human rights.<sup>124</sup> Although these Draft Model Rules were adopted in 1974 in substantially abbreviated form by the U.N. Economic and Social Council,<sup>125</sup> they have been used by the *Ad Hoc* Working Group on

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Int'l L. 696 (1937); Jessup, Foreword to D. Sandifer, Evidence Before International Tribunals, at xi-xii (rev. ed. 1975); Leuridijk, *supra* note 92, at 143-44.

113. See Report of the Economic and Social Council: Protection of Human Rights in Chile, U.N. Doc. A/10285 at 15-17, 94-100 (1975); Secretary-General's Report, *supra* note 14, at 80 (U.N. Temporary Commission on Korea); *id.* at 76 (U.N. Special Committee on Palestine).

114. See J. Carey, *supra* note 95, at 96-98, 111; Ermacora, Enquiry Procedures, *supra* note 14, at 192; Carey, U.N. Scrutiny, *supra* note 95, at 532-33.

115. Report of the United Nations Fact-Finding Mission to South Viet-Nam, 18 U.N. Doc. A/5630, at 7, Annex II (1963). See generally, Kaufman, *supra* note 91, at 753-55, 764-68.

116. Report, *supra* note 115, rules 1-6.

117. *Id.* rules 7-11.

118. *Id.* rules 12-13.

119. *Id.* rules 13-14.

120. *Id.* rules 17-18.

121. *Id.* rules 19-20.

122. *Id.* rules 15-16.

123. *Id.* rule 21.

124. Model Rules of Procedure for United Nations Bodies Dealing with Violations of Human Rights, U.N. Doc. E/CN.4/1021/Rev. 1 (1970) [hereinafter cited as Draft Model Rules of Procedure]. The adoption of rules of procedure has been urged by a number of authors. See, e.g., Kaufman, *supra* note 91; van Boven, *supra* note 14, at 96-107.

125. Report of the Working Group of the Commission on Human Rights on Model Rules of Procedure for United Nations Bodies Dealing with Violations of Human Rights, U.N. Doc. E/CN.4/1134 (1974) [hereinafter cited as Model Rules]. Section IX (rules 18-23), concerning sources of information, was condensed into one rule that allows the organ establishing the ad hoc body to determine its own rules regarding sources, unless the ad hoc body is explicitly authorized by the organ to draw its own such rules. *Id.* at 6-7, rule 18. Some U.N. reports still lack any explanation of fact-finding methodology. See, e.g., Human Settlements: Living Conditions of the Palestinian People in the Occupied Territories, U.N. Doc. A/34/

Chile as the basis for rules of procedure<sup>126</sup> and will probably serve as the framework for rules of future fact-finding commissions. The 25 Draft Model Rules are divided into eleven sections covering applicability, constitution of the ad hoc body, agenda of meetings, officers, secretariat, languages, voting and conduct of business, cooperation with member States, oral and written testimony and other sources of information, records, and reports.<sup>127</sup> The rules allow a commission to make recommendations and issue a minority report.<sup>128</sup> They also permit the concerned State to submit evidence,<sup>129</sup> to appoint a representative, and to put questions to witnesses,<sup>130</sup> but they do not allow the State to make recommendations for the agenda or to place obstacles in the way of the attendance of witnesses.<sup>131</sup> Consent of the concerned State is required for the ad hoc body to enter that State.<sup>132</sup> All evidence is admissible, although its use is subject to the discretion of the commission.<sup>133</sup> Witnesses are placed under oath<sup>134</sup> and commission members swear to perform their duties "honourably, faithfully, impartially and conscientiously."<sup>135</sup> A hearing may be conducted by one or more members.<sup>136</sup>

### *C. The International Labor Organization Fact-Finding Procedures*

The International Labor Organization (ILO) has several fact-

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536, at 3 (1979).

126. U.N. Doc. A/10285 at 15 (1975) [hereinafter cited as Chile Rules].

127. See Draft Model Rules of Procedure, supra note 124; Model Rules, supra note 125.

128. Draft Model Rules of Procedure, supra note 124, at 13, rule 25; Model Rules, supra note 125, at 7, rule 20; Chile Rules, supra note 126, at 100, rule 19.

129. Draft Model Rules of Procedure, supra note 124, at 10, rule 18(e); cf. Belgrade Rules, supra note 69, at 164, rule 13 (permitting both petitioners and the State concerned to present lists of witnesses to the fact-finding mission).

130. Draft Model Rules of Procedure, supra note 124, at 9-10, rule 17(d), (e); cf. Belgrade Rules, supra note 69, at 164, rule 14 (considering it the "ordinary" case to allow the involved State to question complaining petitioners in public session).

131. Draft Model Rules of Procedure, supra note 124, at 9, rule 17(a)(iii).

132. Id. at 10, rule 17(f).

133. Id. rule 20.

134. Id. at 11, rule 22(a)(i), (ii). These provisions were adopted by the ad hoc working group investigating the human rights situation in Chile. See Chile Rules, supra note 126, at 98, rule 15(a)(i), (ii).

135. Draft Model Rules of Procedure, supra note 124, at 5, rule 6. This provision was adopted both in Model Rules, supra note 125, at 2, rule 6, and in Chile Rules, supra note 126, at 94, rule 4.

136. Draft Model Rules of Procedure, supra note 124, at 12, rule 23.



finding bodies, each with its own set of procedural rules and/or practices.<sup>137</sup>

### 1. *Supervision of the Application of Ratified Conventions*

Under article 22 of the ILO Constitution, member States are required to prepare reports on their compliance with certain conventions that they have ratified.<sup>138</sup> These reports are reviewed initially by ILO Secretariat staff in light of relevant national legislation, judicial decisions, and all other information available in writing at the Secretariat.<sup>139</sup> No oral testimony is taken nor are on-site visits made. The government reports and ILO staff analyses are examined by the twenty-member Committee of Experts,<sup>140</sup> which may request more detailed information from the government.<sup>141</sup> Upon receipt of the government's further response, or if there is a lack thereof, the Committee of Experts makes a further request for information or publishes in a report its observations on problems of compliance with the convention at issue.<sup>142</sup>

At the request or with the consent of the government concerned, the Director-General may appoint a representative to pursue direct contacts with a government concerning the application of international labor standards and to report back to the Committee of Ex-

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137. See Jenks, *The International Protection of Trade Union Rights*, in *The International Protection of Human Rights* 210, 219-47 (E. Luard ed. 1967). For discussions of the ILO complaint and inquiry procedures, see C. Jenks, *The International Protection of Trade Union Freedom* 180-200 (1957); Gormley, *The Emerging Protection of Human Rights by the International Labour Organization*, 30 *Albany L. Rev.* 13 (1966); Poulantzas, *International Protection of Human Rights: Implementation Procedures Within the Framework of the International Labour Organization*, 25 *Revue Hellenique de Droit Internationale* 110, 127-29, 136-41 (1972); Valticos, *L'inspection Internationale dans le Droit International du Travail*, in *L'inspection Internationale* 379 (G. Fischer & D. Vignes eds. 1976); Valticos, *Les Méthodes de la Protection Internationale de la Liberté Syndicale*, 1975 *Rec. des Cours* (Neth.) 77; Wolf, *Aspects Judiciaires de la Protection Internationale des Droits de l'Homme par l'O.I.T.*, 4 *Revue des Droits de l'Homme* 773, 776-815 (1971).

138. Constitution of the International Labour Organization, June 28, 1919, 49 Stat. 2712, T.S. No. 874 (entered into force for the United States Aug. 20, 1934), amended, T.I.A.S. No. 1868 (adopted by the United States Oct. 9, 1946).

139. International Labour Office, *Manual on Procedures Relating to International Labour Conventions and Recommendations* 12-19 [hereinafter cited as *ILO Manual*].

140. The Committee of Experts on the Application of Conventions and Recommendations was initially established in 1926. See E. Landy, *The Effectiveness of International Supervision* 19-34 (1966).

141. *ILO Manual*, supra note 139, at 19.

142. *Id.* at 18-20.

perts.<sup>143</sup> The Government may respond to observations. The Conference Committee on the Application of Conventions and Recommendations regularly examines a selection of cases drawn from those on which the Committee of Experts has published observations and the Conference Committee's report is then examined by the full ILO Conference pursuant to article 23 of the Constitution.<sup>144</sup> These procedures have resulted in numerous changes in national law necessary to bring States into compliance with ILO standards.<sup>145</sup>

The ILO Constitution provides for two kinds of filings that set in motion contentious proceedings concerning the application of a ratified Convention: representations and complaints.<sup>146</sup> Under articles 24 and 25, any workers' or employers' organization may file a representation with the International Labor Office alleging that a member State has failed to observe any Convention to which it is a party. The ILO Governing Body may invite the government to respond. If no response is forthcoming or if the government statement is unsatisfactory, the Governing Body may publish the representation and any government response. This procedure has only been used fifteen times in the history of the ILO and apparently does not afford an opportunity for use of the more sophisticated fact-finding techniques employed under other ILO procedures.<sup>147</sup>

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143. *Id.* at 23; International Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, pt. 4A, at 15-16 (1977); see, e.g., International Labour Office, Report by Pierre Juvigny, Representative of the Director-General of the International Labour Office, on Direct Contacts with the Government of Portugal Regarding the Implementation of Abolition of Forced Labour Convention, 1957 (No. 105) at 3-4 (1971). See generally Operation of Existing Machinery and Procedures for Establishing Facts Relating to the Application of International Labour Standards, I.L.O. Doc. GB.205/SC/1/4, at 3 (1978); International Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, pt. 4A, at 13-27 (1979). For a discussion of the analogous direct contacts procedure of the Committee on Freedom of Association, see notes 164-66 *infra* & accompanying text.

144. Constitution of the International Labour Organization, *supra* note 138, art. 23; see ILO Manual, *supra* note 139, at 20-21.

145. International Labour Office, The Impact of International Labour Conventions and Recommendations 15-26, 47-59 (1976). See also E. Landy, *supra* note 140, at 79-204.

146. N. Valticos, International Labour Law 245 (1979).

147. For ILO actions regarding past representations, see, e.g., 1 International Labour Office, International Labour Code 1951, at 761-62 n.16 (1952) (Japan, 1924); *id.* at 762 n.16 (Latvia, 1930); *id.* at 1096-97 n.562 (India, 1935); *id.* at 43-45 n.30 (India, 1936-37); *id.* at 687-89 n.12 (Estonia, 1937-39); *id.* at 1097 n.562 (Mauritius, 1937); 39 I.L.O. Off. Bull. 120-27 (1956) (Netherlands, 1955); 50 I.L.O. Off. Bull. 267-68 (1967) (Brazil, 1965-66); 55 I.L.O. Off. Bull. 125-49 (1972) (Italy, 1970-71); International Labour Office, Report of the Committee set up to Consider the Representation Presented by the International Confederation of

Under article 26 of the ILO Constitution, any member State of the ILO has the right to file a complaint if it is not satisfied that any other member is securing the effective observance of any convention which both States have ratified.<sup>148</sup> Article 26 provides for the appointment of a Commission of Inquiry to consider the complaint and to report thereon. Although article 26 has been used very few times in the history of the ILO,<sup>149</sup> the ILO Constitution contains a series of interesting procedural rules for its implementation. These rules require that member States cooperate,<sup>150</sup> that the Commission state its conclusions and recommendations,<sup>151</sup> and that parties indicate whether they accept the recommendations.<sup>152</sup> The rules also allow for appeal to the International Court of Justice,<sup>153</sup> and empower the ILO to take action in case of failure to implement the recommendations.<sup>154</sup>

## 2. *The Governing Body Committee on Freedom of Association*

Another significant ILO fact-finding procedure was established in 1951 under the Committee on Freedom of Association, which is a tripartite body of nine members from the ILO Governing Body.<sup>155</sup> The Committee has largely replaced the procedures for

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Free Trade Unions under Article 24 of the Constitution Alleging Non-Observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by Czechoslovakia, I.L.O. Doc. GB.206/5/8 (1978).

In November, 1979 the Committee on Standing Orders and the Application of Conventions and Recommendations drafted a proposed revision to the Standing Orders concerning the examination of representations. The draft provides for more effective consideration of representations by eliminating some of the cumbersome requirements found in the current Standing Orders.

148. Constitution of the International Labour Organization, *supra* note 138, art. 26(1); see, e.g., International Labour Office, Report by the Officers of the Governing Body on Two Complaints made by the Government of France Concerning the Observance by Panama Respectively of the Officers' Competency Certificates Convention, 1936 (No. 53) and of the Repatriation of Seamen Convention, 1926 (No. 23) and the Food & Catering (Ships' Crews) Convention, 1946 (No. 68), I.L.O. Doc. GB.207/6/6 (1978).

149. See N. Valticos, *supra* note 146, at 245-47.

150. Constitution of the International Labour Organization, *supra* note 138, art. 27.

151. *Id.* art. 28.

152. *Id.*

153. *Id.* art. 29(2).

154. *Id.* art. 33.

155. International Labour Office, I.L.O. Principles, Standards and Procedures Concerning Freedom of Association 9-10 (1978) [hereinafter cited as ILO Principles]; E. Haas, Human Rights and International Action 26-30 (1970); Poulantzas, *supra* note 137, at 127-29; see also 2 M. Tardu & T. McCarthy, Human Rights: The International Petition System, pt. 5 (1980).

investigating complaints under article 26,<sup>156</sup> and the proposed revision of the Standing Orders concerning articles 24 and 25<sup>157</sup> specifically provides that representations dealing with trade union rights should be referred to this body. The Committee examines complaints against any country, regardless of whether that country has ratified the freedom of association conventions or consented to the investigation.<sup>158</sup> The Committee conducts hearings and undertakes on-site visits<sup>159</sup> and has been able to examine more than 850 cases.<sup>160</sup> The Committee's procedure calls for the complaint to be communicated to the government concerned, so that the government may comment. Complainants are then often asked for comments on the government's response if further information is needed. The Committee may also seek more information from the government itself.<sup>161</sup> The Committee considers the allegations, replies or lack thereof, and the documentary evidence and then submits its conclusions and recommendations to the Governing Body for adoption.<sup>162</sup> Its reports are published.<sup>163</sup>

In urgent cases or where the Committee encounters difficulty in obtaining government responses,<sup>164</sup> the direct contacts procedure may be utilized. Under this procedure, a representative of the ILO Director-General is sent to the country for discussion with the government (if the government will consent),<sup>165</sup> and to transmit to the appropriate authorities the concern underlying the complaint, to obtain the government's reaction, to explain the procedures and principles involved, to appraise the situation giving rise to the

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156. For a discussion of the procedure under art. 26, see notes 148-54 *supra* & accompanying text.

157. For a discussion of the procedure under arts. 24 & 25, see note 147 *supra* & accompanying text.

158. ILO Principles, *supra* note 155, at 9-10.

159. *Id.* at 9.

160. *Id.* at 10.

161. International Labour Office, 193d Report of the Committee on Freedom of Association, I.L.O. Doc. GB.209/6/9, at 3 (1979) [hereinafter cited as 193d Report].

162. International Labour Office, Outline of the Existing Procedure for the Examination of Complaints Alleging Infringements of Trade Union Rights, I.L.O. Doc. GB/LS/March 1977, at 8 (1977).

163. See, e.g., Complaints Presented by the World Federation of Trade Unions, the World Confederation of Labor and Various Other Trade Union Organizations Against the Government of Uruguay (Case 763), 60 I.L.O. Off. Bull., Ser. B, No. 3, at 81 (1977).

164. 193d Report, *supra* note 161, at 5-6.

165. Outline of the Existing Procedure for the Examination of Complaints Alleging Infringements of Trade Union Rights, I.L.O. Doc. GB/LS/March 1977, at 6 (1977); see 55 I.L.O. Off. Bull., Supp., at 6, 9 (1972) (committee report recommending procedures).

complaint, to encourage further response from the government, and to report back to the committee.<sup>166</sup>

In two of its earliest cases and in regard to recent complaints against Uruguay, the Committee has heard separate oral presentations of government representatives and of the complaining international labor organizations.<sup>167</sup> The Committee evidently intends to hear such oral presentations more frequently in the future.<sup>168</sup>

### 3. *The Fact-Finding and Conciliation Commission on Freedom of Association*

Yet another major ILO fact-finding procedure was established in 1950 and 1951 under the aegis of the Fact-Finding and Conciliation Commission on Freedom of Association,<sup>169</sup> which examines complaints about the infringement of trade union rights.<sup>170</sup> This procedure can be invoked whether or not the country has ratified the relevant Conventions. Proceedings may even be commenced against nations which are not members of the ILO.<sup>171</sup> Fact-finding

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166. ILO Principles, *supra* note 155, at 9.

167. 193d Report, *supra* note 161, at 6-7.

168. *Id.* at 7.

169. Report on the Establishment of a Fact-Finding and Conciliation Commission on Freedom of Association, submitted to the Conference by the Governing Body of the International Labour Office, 33 I.L.O. Off. Bull. 74 (1950); see Wolf, *supra* note 137, at 821-27; Wolf, ILO Experience in the Implementation of Human Rights, 10 J. Int'l L. & Econ. 599, 622-23 (1975).

170. The Fact-Finding and Conciliation Commission has investigated only five cases, partly because its procedures require the consent of the government concerned. See N. Valticos, *supra* note 146, at 245-47; Franck & Fairley, *supra* note 70, at 339-40. For an account of these investigations, see International Labour Office, *The Trade Union Situation in Chile: Report of the Fact-Finding and Conciliation Commission on Freedom of Association* (prov. ed. 1975) [hereinafter cited as *Chile Report*]; *Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning Persons Employed in the Public Sector in Japan*, 49 I.L.O. Off. Bull., No. 1, Spec. Supp., at 2 (1966) [hereinafter cited as *Japan Report*]; *Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Trade Union Situation in Greece*, 49 I.L.O. Off. Bull., No. 3, Spec. Supp., at 1 (1966) [hereinafter cited as *Greece Report*]; *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Lesotho*, I.L.O. Doc. GB.197/3/5 (1975) [hereinafter cited as *Lesotho Report*]. The other instance of the invocation of the machinery of the Fact-Finding and Conciliation Commission involves an as yet uncompleted investigation by the Commission into trade union matters in Puerto Rico. See N. Valticos, *supra* note 146, at 251-52. Franck and Fairley used these cases as the basis for a suggested set of procedural norms for use by fact-finding bodies. Franck & Fairley, *supra* note 70, at 340-42. These norms, in turn, formed the basis for the Belgrade Rules. See notes 225-26 *infra* & accompanying text.

171. ILO Principles, *supra* note 155, at 8; Valticos, *La Commission d'Investigation et de Conciliation en Matière de Liberté Syndicale et le Mécanisme de Protection Internationale*

and conciliation panels are normally composed of three independent persons appointed by the ILO Governing Body<sup>172</sup> and authorized to make direct contact with governments in order to pursue an adjustment of difficulties through agreement.<sup>173</sup>

The methodology of the Fact-Finding and Conciliation Commission is modeled upon the infrequently used ILO procedures for Commissions of Inquiry on complaints by States under article 26 of the ILO Constitution.<sup>174</sup> Matters may be referred to the Commission by the ILO Governing Body, on the recommendation of the Committee on Freedom of Association,<sup>175</sup> and the request of the Government,<sup>176</sup> or by the U.N. Economic and Social Council.<sup>177</sup> Upon referral, the Commission may adopt its own rules of procedure, but ordinarily it first requests information from the government and the complainants, as well as from international and national organizations of workers and of employers.<sup>178</sup> The Commission's staff then prepares an analysis of the relevant national legislation, the information submitted by the parties, and other relevant documentation. Thereafter, the Commission takes testimony of witnesses for the parties in hearings in Geneva at which

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des Droits Syndicaux, 1967 *Annuaire Français de Droit International* 445, 450 (Centre National de la Recherche Scientifique).

172. See, e.g., Japan Report, *supra* note 170, at 2.

173. ILO Principles, *supra* note 155, at 8-9.

174. See Constitution of the International Labour Organization, *supra* note 138, art. 26; Past Practice Concerning Special Inquiries with Particular Reference to Human Rights Questions, I.L.O. Doc. G.B.205/21/7, at 5 (1978); Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Complaint Filed by the Government of Ghana concerning the Observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105), 45 I.L.O. Off. Bull., No. 2, Supp. II, at 5-6, 9-12 (1962); Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Complaint Filed by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29), 46 I.L.O. Off. Bull., Supp. II, at 5-7 (1963); International Labour Office, Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Chile of the Hours of Work (Industry) Convention, 1919 (No. 1), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) at 1-5 (1975). See also Valticos, Un double type d'Enquête de l'organisation internationale du travail au Chili, 1975 *Annuaire Français de Droit International* 482, 484-86 (Centre National de la Recherche Scientifique); Vignes, Procédures internationales d'Enquête, 1963 *Annuaire Français de Droit International* 438-59 (Centre National de la Recherche Scientifique).

175. See Japan Report, *supra* note 170, at 1-2; Chile Report, *supra* note 170, at 5.

176. See Greece Report, *supra* note 170, at 2.

177. See, e.g., Lesotho Report, *supra* note 170.

178. ILO Principles, *supra* note 155, at 8; D. Yiannopoulos, La Protection Internationale de la Liberté Syndicale 173-78 (1973).

representatives of the government and complainant are present.<sup>179</sup> In most cases the Commission then requests the government to provide facilities for an on-site visit and to make assurances that witnesses will not be subjected to any form of sanction or coercion.<sup>180</sup>

During an on-site visit, the Commission may meet with the parties in closed session<sup>181</sup> at which it may hear witnesses in private and under oath. Witnesses are excluded from the session except when giving testimony.<sup>182</sup> Before testifying, each witness is informed of the Commission's terms of reference.<sup>183</sup> Members of the Commission and representatives of the parties may question witnesses, subject to the Commission's control.<sup>184</sup>

During on-site visits, members of the Commission may also undertake physical inspections, may meet with individuals,<sup>185</sup> make provisional recommendations to the parties, and make a statement to the press.<sup>186</sup> The Commission then proceeds to draft its final report which contains factual findings and published material,<sup>187</sup> states conclusions, and makes recommendations for the solution of the problems presented.<sup>188</sup> The final report is presented to the Governing Body and is published.<sup>189</sup> In some cases follow-up efforts may be undertaken.<sup>190</sup>

#### 4. *Studies*

A fourth category of fact-finding by the ILO involves studies of general world labor conditions. These studies are undertaken without on-site visits but are based on all the material available to the

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179. ILO Principles, *supra* note 155, at 8.

180. *Id.*

181. See, e.g., Japan Report, *supra* note 170, at 23. For a discussion of the procedures of the Commission, see Nafziger, *The International Labor Organization and Social Change: The Fact-Finding and Conciliation Commission on Freedom of Association*, 2 N.Y.U. J. Int'l L. & Pol. 1 (1969); Valticos, *La protection internationale de la liberté syndicale—Vingt-cinq ans après*, 7 *Revue des Droits de l'Homme* 5, 23-25 (1974).

182. See, e.g., Japan Report, *supra* note 170, at 20-21. Further, the Commission usually excludes testimony irrelevant to the complaints under scrutiny. *Id.*

183. *Id.* at 21.

184. *Id.* at 21-22.

185. *Id.* at 24.

186. *Id.* at 25.

187. *Id.* at 28.

188. *Id.* at 25-27.

189. See authorities cited in note 170 *supra*.

190. See Chile Report, *supra* note 170, at 8.

ILO, including the results of questionnaires and country reports.<sup>191</sup> The studies are published, are usually quite detailed, and often make reference to national laws and practices which may not comply with international labor standards. An ILO study group on one occasion was invited by the Spanish government to visit the country and to perform a study of the trade union situation there.<sup>192</sup>

#### D. *The Inter-American Commission on Human Rights*

The Inter-American Commission on Human Rights has a procedure for on-site fact-finding that it has begun to use more frequently in recent years.<sup>193</sup> At the request of a member State, an individual complainant, or any of the principal organs of the Organization of American States (the General Assembly, the Permanent Council, or a Meeting of Consultation), the Commission may seek permission from a State to undertake an observation "in loco."<sup>194</sup> In addition, the Commission can, on its own initiative, decide by majority vote<sup>195</sup> to request permission for an on-site mission to investigate possible human rights violations. The Statute of the Inter-American Commission on Human Rights arguably empowers the Commission to make on-site visits in connection with

191. See, e.g., International Labour Office, *Abolition of Forced Labour* (1979); International Labour Organization, *Children at Work* (1979); International Labour Office, *Forced Labour* 117, 181-82 (1966).

192. See Valticos, *Une nouvelle expérience de protection des droit de l'homme: le groupe d'étude de l'O.I.T. chargé d'examiner la situation en matière de travail et en matière syndicale en Espagne, 1970 Annuaire Français de Droit International* 567 (Centre National de la Recherche Scientifique).

193. Norris, *supra* note 14; see, e.g., Report on the Situation of Human Rights in El Salvador and Observations of the Government of El Salvador on the Report, O.A.S. Doc. OEA/Ser.P, AG/CP/doc.222/79, at 11-29 (1979) (visit at invitation of government) [hereinafter cited as Report on the Situation in El Salvador]; Report on the Situation of Human Rights in Nicaragua, O.A.S. Doc. OEA/Ser.L/V/II.45, doc. 16 rev. 1, at 5-24 (1978) (visit); Report on the Situation of Human Rights in Panama, O.A.S. Doc. OEA/Ser.L/V/II.44, doc. 38 rev. 1, at 1-2 (1978) (visit at invitation of government); Report on the Situation of Human Rights in Paraguay, O.A.S. Doc. OEA/Ser.L/V/II.43, doc. 13 corr. 1, at 1-9 (1978) (visit refused); Report on the Situation of Human Rights in Uruguay, O.A.S. Doc. OEA/Ser.L/V/II.43, doc. 19 corr. 1, at 1-9 (1978) (visit refused); Second Report on the Situation of Human Rights in Chile, O.A.S. Doc. OEA/Ser.L/V/II.37, doc. 19 corr. 1, at 4 (1976) (later visit possible); Third Report on the Situation of Human Rights in Chile, O.A.S. Doc. OEA/Ser.L/V/II.40, doc. 10, at 2-3 (1977) (use of questionnaire).

194. Norris, *supra* note 14, *passim*.

195. Regulations of the Inter-American Commission on Human Rights, art. 23, O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 26 (1967), reprinted in *Handbook of Existing Rules Pertaining to Human Rights*, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21 rev. 6, at 33 (1979) [hereinafter cited as OAS Handbook].



its authority "to examine communications submitted to it and any other available information deemed pertinent by the Commission; and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights."<sup>196</sup> Although the Commission requires the consent or the invitation of a government to conduct an on-site observation,<sup>197</sup> the government's refusal to grant consent does not prevent the Commission from preparing a report and issuing public statements that may embarrass the government.<sup>198</sup>

Once the Commission has obtained the consent of the State for on-site observation, the Commission is governed by broad rules of inquiry.<sup>199</sup> The Commission chooses the members of the special commission that will conduct the on-site investigation.<sup>200</sup> Before a visit, the special commission and its staff may consult with the government and various human rights organizations about whom the special commission should interview while in the country under investigation. The special commission can interview witnesses without the presence of government officials,<sup>201</sup> can travel freely in the territory of the consenting country,<sup>202</sup> is given access to all jails and other detention centers to conduct private interviews with persons sentenced or detained,<sup>203</sup> is able to utilize any appropriate method for obtaining the information they request,<sup>204</sup>

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196. Statute of the Inter-American Commission on Human Rights, art. 9 (bis)(b), O.A.S. Doc. OEA/Ser.L/V/II.26, doc. 10 (1971), reprinted in OAS Handbook, *supra* note 195, at 27; see Sandifer, *The Inter-American Commission on Human Rights in the Dominican Republic, June 1965 to June 1966*, in *The Dominican Republic Crisis 1965*, at 115, 120-26, 134-40 (J. Carey, ed. 1967).

197. Inter-American Commission on Human Rights, Resolution on On-Site Observations, reprinted in OAS Handbook, *supra* note 195, at 42-43 (adopted at the 42nd session of the Commission, held Oct. 31-Nov. 12, 1977) [hereinafter cited as Resolution on On-Site Observations]. But cf. Belgrade Rules, *supra* note 69, at 164, rule 18 (stating that the fact-finding mission should independently determine the need for on-site inspection; the rule makes no reference to obtaining consent from the government concerned).

198. Norris, *supra* note 14, at 94 (draft). See generally authorities cited in note 193 *supra*.

199. See Inter-American Commission on Human Rights, Regulations Regarding On-Site Observations, O.A.S. Doc. OEA/Ser.L/V/II.35, doc. 4 rev. 1 (1975), reprinted in OAS Handbook, *supra* note 195, at 41; Resolution on On-Site Observations, *supra* note 197.

200. Inter-American Commission on Human Rights, Regulations Regarding On-Site Observations art. 1, O.A.S. Doc. OEA/Ser.L/V/II.35, doc. 4 rev. 1 (1975) reprinted in OAS Handbook, *supra* note 195, at 41; Resolution on On-Site Observations, *supra* note 197, rule 1 (a).

201. Resolution on On-Site Observations, *supra* note 197, rule 1(b).

202. *Id.* rule 1(c).

203. *Id.* rule 1(e). See also Belgrade Rules, *supra* note 69, at 165, rule 21.

204. Resolution on On-Site Observations, *supra* note 197, rule 1(g).

and must be provided by the government with documents or information necessary for the preparation of its report.<sup>205</sup> Although the Rules of the Commission do not so require, it appears to be the practice of the special commission to interview witnesses without the use of an oath. Even though the special commission doesn't recognize parties, as such, in its fact-finding procedures, it may initiate private interviews with government representatives and with domestic human rights organizations.

After the on-site investigation is completed, the special commission will present its report to the Commission and to the government prior to publication.<sup>206</sup> The government is given time to respond to the report.<sup>207</sup> The Commission may include the government's response in the published report.<sup>208</sup>

The Inter-American Commission also has a procedure for the receipt of individual human rights complaints, for obtaining responses from governments, and for making determinations on the complaints.<sup>209</sup> In addition, the Inter-American Commission may promptly bring emergency cases to the attention of governments.<sup>210</sup> These procedures are based entirely upon materials brought to the attention of the Inter-American Commission and do not ordinarily involve any oral presentation or on-site visits, although individual complaints sometimes are resolved through on-site visits arranged in response to a more general concern about human rights in a country.<sup>211</sup> For example, during its visit to a prison in El Salvador, the Inter-American Commission was able to verify complaints that certain individuals had been secretly detained by finding their names or initials inscribed on the doors of

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205. *Id.* rule 1(f).

206. See Norris, *supra* note 14, at 88.

207. *Id.*

208. *Id.*; see, e.g., Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Uruguay, O.A.S. Doc. OEA/Ser.L/V/II.43, doc. 19 corr. 1, at 9 (1978).

209. Statute of the Inter-American Commission on Human Rights, art. 9 (bis) (b), O.A.S. Doc. OEA/Ser.L/V/II.26, doc. 10 (1971), reprinted in OAS Handbook, *supra* note 195, at 27; Regulations of the Inter-American Commission on Human Rights, arts. 37-57, O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 26 (1967), reprinted in OAS Handbook, *supra* note 195, at 35-39; see OAS Handbook, *supra* note 195, at 44-45 (model complaint form).

210. See OAS Handbook, *supra* note 195, at 47; Farer & Rowles, The Inter-American Commission on Human Rights, in *International Human Rights Law and Practice* 47, 68 (rev. ed. 1978).

211. See, e.g., Report on the Situation of Human Rights in Panama, O.A.S. Doc. OEA/Ser.L/V/II.44, doc. 38 rev. 1, at 1, 41-47 (1978).

cells where they had been held.<sup>212</sup>

### E. *The European Commission on Human Rights*

The European Convention on Human Rights<sup>213</sup> establishes procedures for the receipt of petitions from States and individuals concerning the violation of human rights.<sup>214</sup> The European Commission on Human Rights is responsible for considering the admissibility and ascertaining the facts underlying the numerous individual petitions it receives.<sup>215</sup> The Commission relies primarily upon the petition and information supplied by the parties,<sup>216</sup> but after finding a petition to be admissible,<sup>217</sup> it may undertake its investigation in any way it deems necessary, such as by hearing witnesses, examining documents, or visiting any locality.<sup>218</sup> In any oral hearing, the Commission may put questions to the parties and witnesses through its President or his delegate; with the President's leave, Commission members may also question parties and witnesses directly.<sup>219</sup> The Commission rules also provide for witness summonses, oaths, verbatim records of hearings, the appointment of a rapporteur, the form of the report, voting (including the expression of separate opinions in the report), and appeals to the European Court of Human Rights or the Committee of Ministers.<sup>220</sup>

Article 28 of the European Convention requires the signatory

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212. Report on the Situation of Human Rights in El Salvador and Observation of the Government of El Salvador on the Report, O.A.S. Doc. OEA/Ser.P, AG/CP/doc.222/79, at 97 (1979).

213. Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature November 4, 1950, 1953 Gr. Brit. T.S. No. 71 (Cmd. 8969) (entered into force, September 3, 1953), reprinted in Council of Europe, *European Convention on Human Rights*, Collected Texts 101 (1976) [hereinafter cited as *European Convention*].

214. *European Convention*, supra note 213, art. 24 (complaints by States); id. art. 25 (individual petitions).

215. Id. art. 27; see *European Commission on Human Rights, Bringing an Application Before the European Commission on Human Rights*, in 3 Council of Europe, *Case-Law Topics 1* (rev. 1974) [hereinafter cited as *Bringing an Application*].

216. *European Convention*, supra note 213, art. 28(a); A. Robertson, supra note 96, at 172.

217. *Bringing An Application*, supra note 215, at 21-33.

218. *European Convention*, supra note 213, art. 28(a); *Bringing an Application*, supra note 215, at 33-34; Rules of Procedure of the European Commission on Human Rights, rule 30, in Council of Europe, *European Convention on Human Rights*, Collected Texts 301, 308 (1976) [hereinafter cited as *European Rules*]; Monconduit, *La Fonction d'Enquête et d'Instruction*, 2 *Revue des Droits de l'Homme* 208, 208-214 (1969).

219. *European Rules*, supra note 218, rules 31, 34.

220. *European Rules*, supra note 218, rules 30-35, 44-62.

States to furnish the Commission with "all necessary facilities, after an exchange of views with the Commission,"<sup>221</sup> for any inquiry that might be undertaken. Accordingly, the European countries which are parties to the Convention have given consent in advance to any visits that the Commission may require for an investigation, subject only to a requirement of "an exchange of views," that is, prior consultation.<sup>222</sup> For example, a sub-commission visited Cyprus in January of 1958 to investigate an application by Greece against Britain concerning human rights violations that allegedly occurred while Cyprus was still a British colony.<sup>223</sup> Similarly, a sub-commission selected to investigate allegations by a German prisoner of inhuman treatment heard the prisoner's testimony in Berlin and visited the prison with the full cooperation of the government.<sup>224</sup>

#### F. *The Belgrade Rules*

Intergovernmental human rights organizations developed and use the procedural models discussed in the previous sections. NGOs cannot simply adopt these procedures wholesale because NGO objectives, structures, and range of fact-finding efforts differ from those of IGOs. In 1980 the International Law Association met in Belgrade and adopted by consensus a set of rules ostensibly designed specifically for NGO use. The rules resulted from a study of fact-finding by IGOs that revealed "departures from the fundamental norms of due process."<sup>225</sup> The International Law Association perceived a need for an expressed standard of fairness "to encourage states to cooperate with fact-finding missions and to contribute to the credibility of the facts found."<sup>226</sup>

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221. European Convention, *supra* note 213, art. 28(a).

222. See A. Robertson, *supra* note 96, at 172-73.

223. *Id.* at 173-74; 1958-1959 Y.B. Eur. Conv. on Human Rights 174-81 (Eur. Comm. on Human Rights). In 1969 the Sub-Commission investigating the applications of Denmark, Norway, Sweden, and the Netherlands against Greece visited Greece and with the cooperation of the Greek government heard witnesses and inspected detention camps. The Sub-Commission was denied visitation and inspection rights with respect to other witnesses and camps. 1 Council of Europe, *The Greek Case*, pt. 1, at 7-8 (1969).

224. A. Robertson, *supra* note 96, at 175; see Council of Europe, *The Zeidler-Kornmann Case* (1968).

225. *Belgrade Rules*, *supra* note 69, at 163. For the substance of this study, see Franck & Fairley, *supra* note 70, *passim*.

226. *Belgrade Rules*, *supra* note 69, at 163. In their article Franck and Fairley focus on credibility as the rationale for stricter fact-finding procedures. Franck & Fairley, *supra* note 70, at 310.

The Belgrade Rules cover five areas of concern: (1) terms of reference, (2) selection of fact-finders, (3) collection of evidence, (4) the on-site investigation, and (5) the final stage—preliminary findings, the report, and the publication of the report.<sup>227</sup> The rules appear mainly concerned with purging fact-finding missions of all hints of prejudice against the State under investigation. The adversarial model serves as a vehicle for reaching this goal.

The rules require the terms of reference to be objective, consistent with the establishing instrument of the sending organization, unprejudiced as to the issues to be investigated, and specific as to the subject of the investigation.<sup>228</sup> Further, "[t]he resolution authorizing the mission should not prejudice the mission's work and findings."<sup>229</sup>

The rules direct NGOs to select fact-finders "who are respected for their integrity, impartiality, competence and objectivity and who are serving in their personal capacities."<sup>230</sup> The governments under investigation should also be "consulted in regard to the composition of the mission" whenever possible.<sup>231</sup> Members of the fact-finding mission should not be removed or added except in extraordinary circumstances.<sup>232</sup>

NGOs must generally adhere to an adversarial model of fact-finding when collecting evidence under the guidance of the rules. Fact-finding mission staffs should have access to all the relevant materials when the mission begins.<sup>233</sup> The mission may invite written, verifiable statements of fact.<sup>234</sup> The State concerned should be able to comment in writing on all information and statements received by the mission.<sup>235</sup> From a list of witnesses submitted by concerned parties the mission may choose whom it wishes to

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227. Belgrade Rules, *supra* note 69, at 163-65.

228. *Id.* at 163, rules 1, 3; see Franck & Fairley, *supra* note 70, at 315-17.

229. Belgrade Rules, *supra* note 69, at 163, rule 2.

230. *Id.* at 163, rule 4; see Franck & Fairley, *supra* note 70, at 313-15.

231. Belgrade Rules, *supra* note 69, at 163, rule 5. This provision safeguards against the extreme cases cited by Franck and Fairley where members of the mission were from countries openly hostile to the investigated State. Franck & Fairley, *supra* note 70, at 313-14. Allowing countries to object to the composition of the mission, however, would not serve as a delaying tactic in many cases.

232. Belgrade Rules, *supra* note 69, at 163, rule 6.

233. *Id.* at 164, rule 9. For a general discussion of investigation procedures, see Franck & Fairley, *supra* note 70, at 317-21.

234. Belgrade Rules, *supra* note 69, at 164, rule 11.

235. *Id.* rule 12.

hear.<sup>236</sup> If a State guarantees nonretaliation against petitioners, witnesses, and relatives, the mission should allow the State to question the witnesses or make a record of their testimony available to it.<sup>237</sup> Petitioners ought ordinarily to be heard in public sessions where they can be questioned by the concerned State.<sup>238</sup> The mission may withhold information that may jeopardize the safety of witnesses or third parties, or may reveal sources.<sup>239</sup>

From the evidence collected, the mission determines whether it needs to conduct an on-site investigation.<sup>240</sup> Prior to arrival on-site, the mission should draw up an agenda of its activities.<sup>241</sup> The mission may operate as a whole or in smaller groups and should insist on interviewing all necessary persons whether or not incarcerated.<sup>242</sup>

In the final stage of the fact-finding process, the mission should submit preliminary findings and supplementary questions to the concerned State and allow a reasonable time for response.<sup>243</sup> The final report, prepared by the chairperson, should either reflect a consensus or contain majority and minority views.<sup>244</sup> If published, the report should appear in its entirety.<sup>245</sup> NGOs should review the State's compliance with the non-reprisal agreement.<sup>246</sup>

### *G. Appropriateness of Existing Fact-Finding Models to the Work of an NGO*

Although NGOs might profit from the study and adoption of certain of the IGO fact-finding techniques discussed above, it must be recognized that governments and NGOs often engage in fact-finding for different reasons. This difference between NGOs and IGOs might undermine the application of government-created

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236. Id. rule 13.

237. Id. rule 16; see Franck & Fairley, *supra* note 70, at 343 (discussing ILO protections).

238. Belgrade Rules, *supra* note 69, at 164, rule 14; see Franck & Fairley, *supra* note 70, at 335-37 (describing an investigation by the ILO which employed these procedures).

239. Belgrade Rules, *supra* note 69, at 164, rule 17; see Franck & Fairley, *supra* note 70, at 341.

240. Belgrade Rules, *supra* note 69, at 164, rule 18.

241. Id. at 164-65, rule 19.

242. Id. at 165, rules 20, 21.

243. Id. rule 22.

244. Id. rule 23.

245. Id. rule 24. The credibility of a fact-finding mission can be ruined in the final stage if reporting is mishandled. Franck & Fairley, *supra* note 70, at 328-31 (describing the UNESCO mission to areas under Israeli military occupation).

246. Belgrade Rules, *supra* note 69, at 165, rule 25.

rules to nongovernmental fact-finding. NGOs are usually involved in the investigation of governmental misconduct in the human rights field. Hence, it would be perverse to permit governments to establish, even indirectly, the ground rules upon which NGOs may pursue their fact-finding work. Although the fact-finding rules discussed herein were not designed to limit NGO efforts, they are based on the experience of governmental organizations and they reflect the extreme sensitivity of governments to foreign intrusion.<sup>247</sup> To the extent that NGOs may seek to obtain governmental cooperation in their fact-finding and to influence governmental conduct in the area of human rights, however, these rules may still be instructive and helpful to NGOs.

Human rights fact-finding procedures used by multilateral international organizations are more applicable to NGO fact-finding than is the Hague model of bilateral inquiry.<sup>248</sup> The object of inquiry for both NGOs and other relevant international organizations is the human rights situation within one country, rather than a dispute between two States. Accordingly, the fact-finder's terms of reference<sup>249</sup> would not be established by the disputing States, but would be formulated by the initiating organization.<sup>250</sup>

A further distinction between IGO and NGO fact-finding con-

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247. This sensitivity is reflected in the synopsis of the debate concerning the U.N. Draft Model Rules of Procedure. See U.N. Doc. E/CN.4/1134, at 5 (1974); Commission on Human Rights, Report of the Twenty-Seventh Session, 50 U.N. ESCOR Supp. (No. 4) at 53, U.N. Doc. E/4949 (1971).

248. Fact-finding as a method of implementation of human rights is not, in contemporary international law and international relations, a neutral activity based on the assumptions which were valid for international Commissions of Inquiry instituted under the two Hague Conventions. . . . The promotion and encouragement of respect for human rights are a basic purpose of the United Nations and [ILO] . . . . [T]he task of ascertaining the facts is certainly one of a (semi-) judicial character to be performed in an impartial way with a view to disclosing the concrete and real situation. This, however, does not mean that fact-finding is a neutral and uncommitted activity. It is rather a function fulfilled in the public interest and in the light of the purposes and principles of the organisation which provides the machinery for the investigation.

van Boven, *supra* note 14, at 106.

249. Terms of reference are the directions which the fact-finding body must follow in its investigative efforts. Although the body may set forth these instructions for itself, usually the terms of reference are found in the order authorizing the fact-finding mission. They generally delineate what the representative of the body is to do or not to do. Terms of reference are greatly influenced by the intended use of the information by the NGO. See generally notes 243-46 *supra* and notes 269-82 *infra* & accompanying text.

250. Compare Hague Convention of 1907, *supra* note 76, art. 10 with Draft Model Rules of Procedure, *supra* note 124, at 4, rule 3 and Chile Rules, *supra* note 126, at 94, rule 2.

cerns the degree of separation between the initiating body and the commission of inquiry, which is somewhat greater in IGO fact-finding. The U.N. Commission on Human Rights, the International Labor Organization, and the European Commission on Human Rights mount fact-finding bodies which are quite separate from their respective parent bodies.<sup>251</sup> NGOs, however, are private institutions; an NGO mission will often include members of the organization,<sup>252</sup> or even of the NGO secretariat.<sup>253</sup> One consequence of this close connection between the NGO and the commission of inquiry is that the commission's purpose and scope are more directly related to the purposes of the NGO.<sup>254</sup> Hence, anyone who evaluates procedures for possible use by an NGO must be mindful of the "terms of reference" of the NGO itself, as well as the more formal terms of reference established for an NGO fact-finding mission. If an NGO fact-finding mission is not given formal terms of reference, it may instead be guided by the overall objectives of the sending organization.

Another distinction between IGO and NGO fact-finding concerns the scope of the fact-finding effort. Human rights fact-finding by NGOs is not limited to the establishment of missions of in-

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251. Members of IGO commissions usually have much closer ties to their respective countries than to the international body constituting the commission. For example, the U.N. Special Committee to Investigate Israeli Occupied Territories consisted of representatives of U.N. member States. Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, 25 U.N. GAOR Annex 2 (Agenda Item 101) at 11, U.N. Doc. A/8089 (1970). Even when members serve in an individual capacity, however, they often are closely connected to the government of their country. See van Boven, *supra* note 14, at 99-100. See also Bender, *Ad Hoc Committees and Human Rights Investigations: A Comparative Case Study in the Middle East*, 38 Soc. Research 241, 251 (1971).

252. E.g., W. Butler, J. Humphrey, & G. Bisson, *supra* note 30, at vii-viii (missions undertaken on behalf of the International Commission of Jurists).

253. See, e.g., AI Mission to Argentina, *supra* note 68, at 5 (AI International Secretariat member Patricia Feeney was a member of the mission.); AI Mission to Sri Lanka, *supra* note 39, at 9 (AI International Secretariat member Yvonne Terlingen served on the mission.).

254. The Belgrade Rules state that the terms of reference set forth for a fact-finding mission "should accord with the instrument establishing the organization." Belgrade Rules, *supra* note 69, at 163, rule 1. But see Ermacora, *Enquiry Procedures*, *supra* note 14, at 189, 192, 196, 200. Professor Ermacora argues that the purpose of U.N. ad hoc inquiry bodies is to serve policies of the U.N. and not necessarily to ascertain facts in order to resolve conflicts within the concerned State. With this approach he contrasts the International Commission of Jurists' fact-finding commission which was established at the behest of the government of British Guiana. The commission did not serve the ICJ directly, but rather attempted "to facilitate a solution of differences by elucidating the facts." *Id.* at 200.



quiry. For most international human rights NGOs, information gathering is a continuous process.<sup>255</sup> IGO fact-finding bodies usually have a shorter term and a less comprehensive information gathering program. NGO factual studies are undertaken for briefing papers,<sup>256</sup> newsletters,<sup>257</sup> annual reports,<sup>258</sup> special country reports,<sup>259</sup> problem monographs,<sup>260</sup> testimony in national bodies,<sup>261</sup> or presentations to international organizations.<sup>262</sup> Fact-finding must also be undertaken in order to launch a letter-writing campaign,<sup>263</sup> to adopt a prisoner of conscience,<sup>264</sup> or to send a trial observer.<sup>265</sup> Of course, NGO fact-finding often does include full-scale investiga-

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255. Most NGOs monitor newspaper reports and maintain files or even libraries of clippings on human rights violations around the world. Groups like the International League for Human Rights, International Commission of Jurists, Amnesty International, and various church groups also receive information from local affiliate groups and individual members. See generally Weissbrodt, *International NGOs*, *supra* note 1, at 300.

256. E.g., AI, *Amnesty International Briefing: German Democratic Republic (GDR)* (Oct. 1977); AI, *Amnesty International Briefing: Morocco* (Oct. 1977); AI, *Amnesty International Briefing: Rhodesia/Zimbabwe* (Mar. 1976).

257. E.g., *Amnesty International Newsletter*; *International Commission of Jurists Review*; *Human Rights Bulletin*.

258. AI, *Amnesty International Report 1978* (1979); ICRC, *Annual Report 1977* (1978); *International League for Human Rights, Annual Review 1976-1977* (1977).

259. E.g., AI, *Indonesia* (1977); AI, *Political Imprisonment in the People's Republic of China* (1978); *International Commission of Jurists, Final Report of Mission to Chile, April 1974, to Study the Legal System and the Protection of Human Rights* (1974).

260. E.g., AI, *Evidence of Torture: Studies by the Amnesty International Danish Medical Group* (1977); *International Defence and Aid Fund, South Africa: The Boss Law* (1970); J. Mercer, *supra* note 24.

261. See *House Hearings on International Protection of Human Rights*, *supra* note 1, at 2 (*International Commission of Jurists*), 252 (*Amnesty International*), 375 (*International League for Human Rights*); *Human Rights in Africa: Report by the International Commission of Jurists: Hearing Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs, 93d Cong., 2d Sess., passim* (1974) (testimony of Niall MacDermot, Secretary General, *International Commission of Jurists*); *Human Rights in Uruguay and Paraguay: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations, 94th Cong., 2d Sess. 105* (*International League for Human Rights*), 154 (*International Commission of Jurists*) (1976).

262. See, e.g., U.N. Docs. E/CN.4/NGO/228-258 (1979); Weissbrodt, *International NGOs*, *supra* note 1 at 306-08.

263. A good example is the Amnesty International campaign on El Salvador. Before the letter-writing started, AI distributed limited circulation background material entitled *El Salvador: Case Studies, July 1976-December 1977* (Jan. 27, 1978). Subsequently, the October-December 1978 campaign was carried out. AI, *El Salvador Campaign 1: Campaign Outline* (July 5, 1978); AI, *1978 El Salvador Campaign: Report and Evaluation* (May 14, 1979).

264. See AI, *Amnesty International: Handbook for Groups 9* (1977). The Handbook also contains some guidance for groups engaging in investigation and subsequent adoption of a prisoner of conscience. *Id.* at 13, 40-41.

265. Martin-Achard, *supra* note 31, *passim*; see note 374 *infra*.

tions of a country, with or without on-site inspection. An NGO may even undertake more traditional international inquiry and act as a third party fact-finder at the request of consenting State parties, as did the International Commission of Jurists in the British Guiana case.<sup>266</sup>

Furthermore, any given fact-finding rule may be appropriate to some of an NGO's fact-finding efforts but not to others. The activities of NGOs vary as to the seriousness of their consequences. An oral request of a government as to the whereabouts of a prisoner will cause far fewer repercussions than will a press release or a submission to the U.S. Congress denouncing a State's use of torture.<sup>267</sup> In the common law system, the distinction between civil and criminal liability is reflected in the stricter burden of proof and evidentiary standards for criminal cases.<sup>268</sup> A similar distinction needs to be made in the application of rules of procedure to NGO fact-finding. When the consequences are serious, an NGO should follow more closely the quasi-adjudicative procedures that ensure greater accuracy and respect for findings. For less serious actions, an NGO may rely on less direct evidence and a less rigorous set of procedures.

The foregoing discussion has been devoted to a general description of fact-finding procedures developed by a variety of international bodies. What follows is a more detailed examination of the methods used by both NGOs and IGOs to deal with specific issues arising during the course of a fact-finding mission.

### III. THE FACT-FINDING PROCESS

Certain questions are faced by every fact-finding body: Who are to be members? What is its mandate? What sources of information are to be used? How is reliability of information to be ensured? Are recommendations to be made? The procedures that NGOs adopt to deal with these questions affect the weight placed upon NGO findings by the rest of the world. Thus, it may be useful to compare how intergovernmental and nongovernmental organiza-

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266. See International Commission of Jurists, Report on the British Guiana Commission of Inquiry 9-10 (1965). See also International Commission of Jurists, Report on the Events in Panama January 9-12, 1964, at 3 (1964).

267. Compare de Onis, *Argentina Beset by Arrest Queries*, N.Y. Times, Aug. 16, 1976, at 5, col. 1 with *Uruguay's Military Leaders Angry Over Congressional Cutoff on Aid for Arms*, N.Y. Times, Oct. 5, 1976, at 13, col. 1.

268. See C. McCormick, *Handbook of the Law of Evidence* 364-65, 798-99 (2d ed. 1972).

tions have decided to conduct each phase of a typical fact-finding mission. Insight may thereby be gained into the areas in which NGOs may profit from the experience of IGOs.

### A. *Composition and Nature of the Fact-Finding Body*

#### 1. *Terms of Reference*

In bilateral and multilateral forms of inquiry, the terms of reference governing the competence of the commission are established by negotiation between two or more States.<sup>269</sup> The sovereignty of the investigated State is encroached upon either by its own agreement or by the authority of a multilateral instrument.<sup>270</sup> The authority for NGO fact-finding, however, is usually self-created. NGOs define the scope of their study and legitimize their efforts after the fact by the reliability of their findings.<sup>271</sup>

Although the general bounds of NGO fact-finding are self-defined, definite terms of reference are often established for each mission by the governing board of the organization. The terms may be very broad, for example, "to visit Paraguay for the purpose of studying the status of human rights,"<sup>272</sup> or relatively narrow, as exemplified in the International Commission of Jurists' British Guiana Commission—"to examine the balance between the races in the Security Forces, the Civil Service, . . . to consider whether existing procedures relating to selection, appointment, promotion, dismissal [in the Civil Service] . . . encourage or lead to racial discrimination . . . [and] to make such recommendations as are considered necessary . . . ." <sup>273</sup> The scope of NGO scrutiny is some-

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269. See T. Bensalah, *L'Enquête Internationale dans Le Règlement des Conflits* 53-62 (1976).

270. Although the general authority for an IGO fact-finding body is based in a multilateral agreement, the actual terms of reference of an IGO body are often subject to objection by the concerned State. See Ermacora, *Enquiry Procedures*, *supra* note 14, at 191.

271. See generally Scoble & Wiseberg, *supra* note 1.

272. See B. Stephansky & R. Alexander, *Report of Commission of Enquiry into Human Rights in Paraguay of the International League for Human Rights* 1 (Sept. 1976).

273. International Commission of Jurists, *Racial Problems in the Public Service* 15 (1965). The terms of reference were not part of the British Guiana ordinance which conferred juridical power on the commission, but were established by the International Commission of Jurists. It was clear, however, that the terms of reference had been accepted by the British Guiana government. Ermacora, *Enquiry Procedures*, *supra* note 14, at 198.

The need for a clear mandate has been illustrated by the lack of such of a mandate in the case of the Commission of Inquiry on Iran, which was "instructed only to undertake a fact-finding mission to Teheran to hear Iran's grievances, and to allow an early solution to the crisis between Iran and the United States." U.N. Press Release IR/2/Rev. 1 (Feb. 25, 1980).

times limited to the human rights of one group within a nation,<sup>274</sup> but more commonly will cover the entire country.<sup>275</sup>

Amnesty International (AI), the International Commission of Jurists (ICJ), and the International League for Human Rights (League) usually provide within their terms of reference for investigation into the conditions and basis for detention, the legality of the procedures for arrest and trial, the truth of allegations of torture, killings, or other violations of human rights by the government, and evidence of encroachments on the freedom of association, speech, or the press.<sup>276</sup> The legitimacy of the government itself is usually considered outside the scope of a mission's study,<sup>277</sup> although some reports include some historical, political, economic, and legal background.<sup>278</sup> In contrast to these three NGOs, fact-finding by the International Committee of the Red Cross (ICRC) is "confined solely to the inspection of material conditions of detention and without regard to the reason of such detention."<sup>279</sup> The ICRC never proceeds without a formal written

But see W. Shore, *supra* note 14, at 106 (possible restrictiveness of specific terms of reference).

274. See, e.g., National Lawyer's Guild, *Treatment of Palestinians in Israeli-Occupied West Bank and Gaza* (1978).

275. See, e.g., AI, *Islamic Republic of Pakistan* (1977); Russell International War Crimes Tribunal, *Against the Crime of Silence* (J. Duffet, ed. 1968) [hereinafter cited as *Against the Crime of Silence*] (the country at issue was Vietnam); Second Russell Tribunal, *Repression in Latin America* (W. Jerman trans. & ed. 1975) [hereinafter cited as *Repression in Latin America*] (the Russell Tribunal investigated four countries).

276. See, e.g., AI Mission to Argentina, *supra* note 68, at 5; AI Mission to Sri Lanka, *supra* note 39, at 17; AI, *Report of an Amnesty International Mission to the Republic of Korea* 27 March-9 April 1975, at 15 (2d ed. 1977) [hereinafter cited as *AI Mission to Korea*]; Bizerta Report, *supra* note 59, at 3; W. Butler, J. Humphrey & G. Bisson, *supra* note 30, at vii; B. Stephansky & D. Helfeld, *supra* note 30, at 1-2.

277. But see International Commission of Jurists, *The Events in East Pakistan, 1971*, at 46-48 (1972).

278. See Kaufman, *supra* note 91, at 755; see, e.g., W. Butler, J. Humphrey & G. Bisson, *supra* note 30, at 1-9; W. Butler & G. Levasseur, *Human Rights and the Legal System in Iran* (1976); B. Stephansky & R. Alexander, *supra* note 272, at 1-21.

279. Bissell, *The International Committee of the Red Cross and the Protection of Human Rights*, 1 *Revue des Droits de l'Homme* 255, 271 (1968) (quoting International Committee of the Red Cross, *Annual Report* 1958, at 29 (1958)); see J. Freymond, *Guerres, Révolutions, Croix-Rouge* 129-36 (1976). The ICRC does, however, occasionally "structure their overtures to the government according to the reasons for detention. For example, where a detainee is an administrative detainee, held without indictment or prospect of trial, the ICRC tends to urge that conditions of detention should be as good as economics and security will allow." D. Forsythe, *supra* note 20, at 68. The ICRC has also engaged in trial observation and in limited legal assistance to persons under the laws of armed conflict. *Id.* at 70.

agreement with the "detaining government,"<sup>280</sup> wherein the scope of fact-finding activity is mutually agreed upon by the detaining State and the ICRC.<sup>281</sup>

Terms of reference serve several useful purposes and should be used by NGOs. First, written terms of reference may induce governments to cooperate and may be subject to negotiation with the governments. Although most NGO missions are not established by formal agreement between the NGO and the State, there is often some contact with the government prior to the establishment of a mission.<sup>282</sup> Second, formal terms of reference act as a fact-finding commission's letter of introduction to the government. This is helpful not only for on-site missions, but also for commissions making contact through the mail or with embassies and consulates. This function of terms of reference was explicitly recognized by Amnesty International in its instruction to the Sri Lanka mission "to re-establish a dialogue between AI and the government of Sri Lanka."<sup>283</sup> Third, terms of reference serve as an aid to commission members in resolving disputes over the scope of a commission's activities. Although NGO missions are not as large or diverse in their composition as IGO commissions, individuals of differing backgrounds and views do work together on NGO missions.<sup>284</sup>

The factors discussed above tend to call for narrowly stated terms of reference. However, as with the formulation of other pro-

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280. See D. Forsythe, *supra* note 20, at 57-86.

281. *Id.*; see, e.g., *Agreement Between the Government of the Kingdom of Hellas and the International Committee of the Red Cross*, reprinted in *id.* at 268-70, app. D (written agreement entered into in 1969). See also note 379 *infra*.

282. See, e.g., AI, *Islamic Republic of Pakistan* 5 (1977) (Before the mission, AI's Secretary General and a member of the mission met with the Attorney General of Pakistan.); AI, *The Republic of Nicaragua* 5 (1977) (Before departure, the mission sent a telegram to President Somoza.). In contrast, the National Lawyers Guild recently sent an undercover fact-finding mission to Guatemala without informing the government because of concern for the lives of potential witnesses. Also, it is the practice of the International Commission of Jurists merely to send a telegram or letter to the Minister of Justice of the concerned government, informing him of the forthcoming arrival of an ICJ trial observer and requesting appropriate facilities. See International Commission of Jurists, *Guidelines for ICJ Observers to Trials 1-2* (1978). In addition, the ICJ prefers to send observers who do not require visas. *Id.* Most major ICJ fact-finding missions, however, have enjoyed the consent of the government.

283. AI *Mission to Sri Lanka*, *supra* note 39, at 17.

284. See, e.g., AI, *Islamic Republic of Pakistan* 5 (1977) (The mission was composed of a Turkish lawyer and a Dutch lawyer.); AI *Mission to Korea*, *supra* note 276, at 15 (The mission consisted of a Danish surgeon and an English barrister.); AI, *Report of an Amnesty International Mission to Spain* 3 (1975) (An American attorney and a professor of philosophy from the Federal Republic of Germany were the delegates.).

cedures, there is a danger in making the terms too specific. Narrow terms of reference may hamper a mission's operation or, if the mission exceeds its terms, give the government a pretext for attacking its findings.<sup>285</sup>

## 2. *Members*

Like IGOs, NGOs face the problem of finding qualified and impartial mission members<sup>286</sup> who can add the weight of personal prestige to their findings. The bulk of NGO fact-finding is done by permanent employees of NGO Secretariats and by distinguished individuals who participate at the request of the NGO. No NGO or group of NGOs has established a panel of experts for inquiry missions such as has been recommended for the U.N.<sup>287</sup> and established by the ILO.<sup>288</sup> Such a panel is not really necessary nor is it particularly feasible.<sup>289</sup>

There is no simple method for ensuring the expertise of the members of a mission. Since service on missions is voluntary and can involve some hardship, members characteristically have a strong interest in and are very knowledgeable about human rights.<sup>290</sup> NGOs that regularly engage in fact-finding make use of

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285. The Belgrade Rules of the International Law Association usefully suggest this balance by proposing that the terms of reference should not "unduly restrict the mission," but "should be so specific as to indicate the nature of the subject to be investigated." Belgrade Rules, *supra* note 69, at 163, rule 3. U.N. inquiry commissions are routinely attacked by concerned governments for exceeding their power under the U.N. Charter. See, e.g., Report of the Economic and Social Council, Protection of human rights in Chile, U.N. Doc. A/33/331, at Annex LXXXII (1978); cf. Bos, *The International Law Commission's Draft Convention on Arbitral Procedure in the General Assembly of the United Nations*, 1956 *Nederlands Tijdschrift Voor Internationaal Recht* 234, 237-42 (discussion of curtailment of parties' autonomy in arbitral proceedings by restrictive terms of arbitration).

286. Cf. Kaufman, *supra* note 91, at 756-58 (difficulty of assembling impartial group by the U.N.).

287. See N. Bar-Yaacov, *supra* note 14, at 296-312; Leuridijk, *supra* note 92, at 158-61; Note, *supra* note 95, at 175-83. Although the General Assembly requested the Secretary-General to prepare a register of experts in 1967, Question of Methods of Fact-Finding, G.A. Res. 2329, 22 U.N. GAOR Supp. (No. 16) at 84, U.N. Doc. A/6716 (1968), no experts have been named or used.

288. E. Landy, *supra* note 140, at 19-23. Recommendations for fact-finding panels have taken various forms. See, e.g., C. Schurman, A Center for International Fact Finding: A Review and a Proposal 26-28 (1963).

289. But see Rodley, *supra* note 1, at 147-50, suggesting an NGO worldwide human rights monitoring institution which would be distinct from other NGOs and would not be involved in publicity and lobbying activities.

290. See, e.g., W. Butler, J. Humphrey & G. Bisson, *supra* note 30, at viii (Professor John P. Humphrey was a member of the mission.). Mission members are exposed to some per-

the previous fact-finding experience of individuals. Nearly every NGO mission has had at least one lawyer or law professor;<sup>291</sup> jurists serve on missions in numbers not justified by any need for legal expertise. Given the amount of evidence concerning physical abuse, AI has recognized that a mission can be assisted in its fact-finding by a doctor and thus has included physicians on several missions.<sup>292</sup> AI missions also usually include a member of the Secretariat who is familiar with the country under investigation.<sup>293</sup> Some NGO missions have included foreign scholars who possess expertise on the country studied.<sup>294</sup>

In addition to the expertise needed to facilitate fact-finding, another factor considered by NGOs in selecting commission members is the prestige associated with the names of experts in various fields. Commission members have included noted legal authorities,<sup>295</sup> philosophers,<sup>296</sup> authors,<sup>297</sup> a U.S. Congressman,<sup>298</sup> a former U.S. Ambassador,<sup>299</sup> church officials,<sup>300</sup> a member of the Supreme

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sonal risk. See C. Jenks, *International Immunities* 144-45 (1961); R. Rodgers, *Facilitation Problems of International Associations* 69-81 (1960); Sandifer, *supra* note 196, at 131-32.

291. See, e.g., Bizerta Report, *supra* note 59, at 3.

292. See, e.g., AI, *Evidence of Torture: Studies by the Amnesty International Danish Medical Group* 7-8 (1977); AI, *Report of an Amnesty International Mission to Israel and the Syrian Arab Republic to Investigate Allegations of Ill Treatment and Torture* 3 (1975) [hereinafter cited as *AI Israel-Syria Report*] (A Dutch physician was a member of the mission.); AI *Mission to Korea*, *supra* note 276, at 15 (A Danish surgeon went on the mission to Korea.).

293. For example, Michael McClintock, a researcher in the Latin American Department of the International Secretariat of Amnesty International, served on the mission to Nicaragua. See AI, *The Republic of Nicaragua* 5 (1977).

294. For example, Professor Thomas Anderson, a noted North American scholar on El Salvador, was a member of a church-sponsored fact-finding mission to that country. Unitarian Universalist Service Committee, *Human Rights in El Salvador—1978: Report of Findings of an Investigatory Mission* i (1978) [hereinafter cited as *Human Rights in El Salvador*].

295. See, e.g., International Commission of Jurists, *Report on the Activities of the International Commission of Jurists 1971-1977*, at 31-35 (1977).

296. See, e.g., AI, *Report of an Amnesty International Mission to Spain* 3 (1975) (mission included Dr. Burkhard Wisser, a German professor of philosophy).

297. For example, Bertrand Russell, Jean-Paul Sartre, James Baldwin, Peter Weiss, Simone de Beauvoir, and Sara Lindman served on the Russell International War Crimes Tribunal. *Against the Crime of Silence*, *supra* note 275, at 17.

298. See, e.g., AI *Mission to Argentina*, *supra* note 68, at 5; *Human Rights in El Salvador*, *supra* note 294, at 1 (Congressman Robert Drinan was a member of both missions.).

299. See, e.g., B. Stephansky & R. Alexander, *supra* note 272, at i (Dr. Ben Stephansky is a former U.S. Ambassador to Bolivia.).

300. See, e.g., AI, *Amnesty International Report 1978*, at 278 (1979) (The Reverend Paul Oestricher of Great Britain was a member of a mission to the Federal Republic of Germany.).

Court of Ireland,<sup>301</sup> and a member of the U.N. Human Rights Commission.<sup>302</sup> Personal prestige is more important for ad hoc commissions of inquiry than for permanent NGOs that have established their own respectability.

Governmental representatives rarely serve on NGO commissions. Unlike some IGOs, in which members of fact-finding commissions have acted as though they were representing their governments rather than the organizations that sent them,<sup>303</sup> NGOs have not generally had a problem with de facto State representation.<sup>304</sup> Even though NGO commissions are ordinarily not politicized, their impartiality is influenced by the nationality and political beliefs of their members.<sup>305</sup> AI, ICJ and League missions are usually made

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301. See, e.g., International Commission of Jurists, Report on the Activities of the International Commission of Jurists 1971-1977, at 35 (1977) (Mr. Justice Seamus Henchy of the Supreme Court of Ireland was an ICJ observer of the trial of Bishop Donal Lamont in Umtali, Rhodesia.).

302. See, e.g., International Commission of Jurists, Racial Problems in the Public Service: Report of the British Guiana Commission of Inquiry 9 (1965); Bizerta Report, *supra* note 59, at 3 (Professor Felix Ermacora was a member of both ICJ commissions.).

303. See W. Shore, *supra* note 14, at 107-10; Kaufman, *supra* note 91, at 752-54.

304. See Cohn, International Fact-Finding Processes and the Rule of Law, *Int'l Comm'n Jurists Rev.*, June 1977, at 40, 43; T. Franck, The Structure of Impartiality 253-55 (1968). It is, perhaps, a questionable practice to use an official of one government to examine or investigate another government, because bilateral government relations may affect the necessary appearance of impartiality. See, e.g., Human Rights in El Salvador, *supra* note 294 (Congressman Robert Drinan was a member of this investigatory mission.).

Before the International Commission of Jurists sent a mission to South Korea, the mission was briefed by the U.S. State Department and by the National Council of Churches in New York. See A. DeWind & J. Woodhouse, Prosecution of Defence Lawyers in South Korea 4 (1979). The mission also met with the U.S. Ambassador to South Korea when they visited that country. There is some question whether such briefings by another government might in some cases identify the mission with the briefing country and thus prejudice the conduct and, perhaps, the result of the mission. Such did not appear, however, to be the case in the ICJ's South Korean mission, but NGOs ought to be conscious of the risks inherent in such governmental briefings.

305. See Note, *supra* note 95, at 164-65; see, e.g., Report on the Mission to Viet Nam of the Delegation of the International Association of Democratic Lawyers, U.N. Doc. A/34/559, at 2 (1979) (The impartiality of this IADL mission must be somewhat suspect since one of the participating members, Hope Stevens, also served as counsel in the People's Revolutionary Tribunal of Pnom Penh.).

Because the fact-finding tribunal possesses tremendous discretion as to the evidence sought, how the evidence is weighed, and even what law should be applied, the fact-finders must possess great integrity, impartiality, and independence. Cf. Damaska, Structures of Authority and Comparative Criminal Procedure, 84 *Yale L.J.* 480, 525 (1974) (similarity of duties of fact-finding tribunals and duties of trial judges in Europe).

The Belgrade Rules sensibly recommend that the fact-finders be persons "respected for their integrity, impartiality, competence and objectivity and who are serving in their personal capacities." Belgrade Rules, *supra* note 69, at 163, rule 4. But these Rules also recom-



up of members from several countries and rarely include a national of the country visited.<sup>306</sup> Almost all ICRC representatives are Swiss.<sup>307</sup> The membership of an NGO commission will often reflect its political orientation. Members of ICRC,<sup>308</sup> AI, the League, and ICJ missions are drawn predominantly from industrialized Western nations, whereas members of commissions of the International Association of Democratic Lawyers (IADL) and the World Peace Council come from socialist organizations and socialist-aligned countries.<sup>309</sup> Very few commission members are drawn from Third World States, although AI has sent several Third World observers to missions in the United States.<sup>310</sup> The difficulty of establishing the impartiality of a commission based in an industrialized nation was demonstrated by the denial to ICRC of access to North Vietnam during the U.S. military involvement there, and by African suspicions concerning ICRC intervention in Nigeria's civil war.<sup>311</sup>

NGO fact-finding missions are usually composed of from one to

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ment that the States concerned be consulted about the fact-finders. *Id.* rule 5. Such consultation is occasionally undertaken for major U.N. fact-finding efforts, but is very rare for NGOs. Although consultation as to mission membership would in theory facilitate the mission's entry into the subject country, such consultation may give an appearance of bias in favor of the government, may be inappropriate for an NGO striving to maintain an identity as independent of all governments, and may provide the government with an opportunity to attack or resist the mission. A rule requiring consultation would be unwise, because such consultation, if sought at all, is ordinarily undertaken informally and with considerable discretion. Governments should not expect to be consulted formally on mission membership.

The Belgrade Rules also recommend that a member, chairperson, or rapporteur of a fact-finding mission not ordinarily be removed before completion of the mission's work. *Id.* at 163-64, rules 6 & 7. Such a rule appears sensible, but addresses an issue which has not been a problem for NGOs. Politicized IGOs may have this problem.

306. See AI, Amnesty International Report 1978, at 278-79 (1979); AI, Amnesty International Report 1977, at 318-20 (1977); International Commission of Jurists, *supra* note 295, at 31-38. But see D. Weissbrodt, Memorandum to International Executive Committee of Amnesty International concerning Mission to Florida (June 18, 1979) (copy on file with the authors).

307. D. Forsythe, *supra* note 20, at 206.

308. In regard to the ICRC, see *id.* at 206-14.

309. As a result of this East-West split, NGO commissions have sometimes been used for political purposes. See Ermacora, *Enquiry Procedures*, *supra* note 14, at 203.

310. See, e.g., AI, Amnesty International Report 1978, at 139 (1979) (In January 1978, two Zambian lawyers were sent to observe the trial of Leonard Peltier in Wisconsin.); AI, Amnesty International Report 1977, at 163, 320 (1977) (Shamsul Bari, an attorney from Bangladesh, was sent to North Dakota to observe another Peltier trial.).

311. See T. Hentsch, *Face au blocus, Le Croix-Rouge Internationale dans le Nigéria en Guerre* (1973); Scoble & Wiseberg, *supra* note 1, at 630-31; Comment, *The Geneva Convention and Africa*, 7 E. Afr. L.J. 275, 283-89 (1971). But see D. Forsythe, *supra* note 20, at 48-49 (acceptance of ICRC more widespread among third world nations such as Nigeria, Bangladesh and Indochina than among socialist states).

three individuals who visit the country concerned.<sup>312</sup> NGO missions are smaller and less representative than are IGO commissions<sup>313</sup> because of restrictions imposed by limited financial means.<sup>314</sup> NGOs that undertake fact-finding on an ad hoc basis without making on-site visits tend to have larger commissions with less of an emphasis on the impartiality of members.<sup>315</sup>

### 3. *Financial Considerations*

The source of funds for NGO fact-finding can taint the impartiality of an inquiry mission. The ICJ relies principally upon grants from foundations and from twenty countries, including several Third World nations.<sup>316</sup> The AI Secretariat had a budget of 915,377 pounds sterling for the 1978 fiscal year ending on April 30, 1978,<sup>317</sup> most of which was raised through dues and contributions from members.<sup>318</sup> AI does not accept money from governments. The ICRC budgeted 49,597,000 Swiss francs for 1978.<sup>319</sup> Fifty per-

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312. See, e.g., AI, *The Republic of Nicaragua* 5 (1977); W. Butler, J. Humphrey & G. Bisson, *supra* note 30, at vii-viii; B. Stephansky & D. Helfeld, *supra* note 30, at i.

313. For example, U.N. fact-finding missions usually have five or six members. See, e.g., Report of the Economic and Social Council, Protection of human rights in Chile, U.N. Doc. A/33/331 (1978); Report of the *Ad Hoc* Working Group of Experts on the Investigation Requested in Resolution 21 (XXV) of the Commission on Human Rights, U.N. Doc. E/CN.4/1020 at 4-5 (1970). The European Commission of Human Rights had 15 members when it investigated the Greek Case. See 1 Council of Europe, *supra* note 223, pt. 1, at 2.

314. See notes 316-26 *infra* & accompanying text.

315. The Russell Tribunals on Vietnam and Latin America each had more than 20 members. The investigation of American war crimes in Vietnam included four Americans, the Chairperson of the Cuban Committee for Solidarity with Vietnam, as well as a number of outspoken authors and scholars. The Second Russell Tribunal, which received evidence on right-wing Latin American dictatorships, was composed primarily of individuals with a left-of-center political affiliation. See *Repression in Latin America*, *supra* note 275, at 162-63; *Against the Crime of Silence*, *supra* note 275, at 17. See also Cassese, *Progressive Transnational Promotion of Human Rights*, in *Human Rights: Thirty Years After the Universal Declaration* 249, 254-58 (B. Ramcharan ed. 1979).

The Chicago Commission of Inquiry into the human rights situation in Chile was composed of 12 Chicagoans. See *Chicago Commission of Inquiry into the Status of Human Rights in Chile* 1 (1974) (This group included the father of a person killed while in military custody at the National Stadium in Santiago.); Comment, *Human Rights, Chile, and International Organizations*, 24 *De Paul L. Rev.* 999, 1004-06 (1975). A Commission of Enquiry on mercenaries in Angola consisted of 42 members from 36 countries. See L. Hinds and H. Stevens, *International Commission of Enquiry on Mercenaries* 15 (1976).

316. See *International Commission of Jurists, Objectives, Organization, Activities* 5 (1972); Note, *supra* note 1, at 477.

317. AI, *Amnesty International Report 1978*, at 283 (1979).

318. See *id.* at 288-89, 291.

319. *International Committee of the Red Cross, Annual Report 1978*, at 68 (1978).

cent of ICRC's permanent budget comes from the Swiss government, ten percent from the U.S. government, with the remainder coming from other governments and national Red Cross societies.<sup>320</sup> The League operates on a budget of \$75,000 to \$100,000, its resources drawn from membership contributions, affiliated organizations, foundations, and special fund raising events.<sup>321</sup> Like AI, the League does not accept funds from governments.<sup>322</sup>

Because most NGOs lack funds in their regular budgets sufficient to mount fact-finding missions, specific fund raising efforts are often undertaken for each mission.<sup>323</sup> To the extent that fund raising is undertaken on a mission-by-mission basis, the source of funds may give rise to an appearance of bias on the part of the mission. For example, if an NGO during the late 1960's had undertaken to send a mission to investigate torture under the Greek Colonels, the mission might have relied upon Greek expatriate groups and individuals for some or all of its support. Indeed, without such interested supporters, it is likely that the NGO would not have been able to mount the mission at all. If the source of funds for the mission had become known, however, the results might very well have been suspect. Nevertheless, this problem may be more a question of appearances than reality. The members of fact-finding missions are rarely aware of the source of the funding for their mission. Furthermore, mission members are ordinarily of such unimpeachable integrity and independence that the source of their funds would have no effect on their conclusions, even if the sending NGO had a bias it wished to pursue.

Financial considerations do, however, loom large in the decisions as to which fact-finding missions will be undertaken.<sup>324</sup> Some NGOs seek funds from disinterested sources, such as other human rights organizations, religious bodies, and special United Nations funds. AI has attempted to solve the problem of how missions will be funded by establishing a separate account for all special projects, including missions, conferences, and translations.<sup>325</sup> AI

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320. See D. Forsythe, *supra* note 20, at 216-18.

321. Wiseberg & Scoble, *The International League*, *supra* note 23, at 296 n.15.

322. *Id.* at 295; Note, *supra* note 1, at 480.

323 See, e.g., Basso, *Inaugural Discourse*, in *Repression in Latin America*, *supra* note 275, at 9; Note, *supra* note 1, at 296 n.15.

324. Cassese, *supra* note 1, at 257; Weissbrodt, *International NGOs*, *supra* note 1, at 300-01.

325. See AI, *Amnesty International Report 1978*, at 286-87, 294-95 (1979).

has been successful in raising money for such accounts without tying the contributions to any particular mission.

In any case, missions are expensive and the availability of funds may affect the quality of a mission's findings and will determine how long a mission will last, how many members the mission can include, how many transcripts can be read, and how many records copied.<sup>326</sup> Financial considerations thus dictate that investigative efforts be carefully selected in terms of need and importance.

## B. *Methods of Inquiry*

### 1. *Background Fact-Finding by Secretariats*

As previously discussed, the bulk of NGO fact-finding is performed by the national and international offices of the organizations. There are no limitations on the types of information gathered. At their international centers, NGOs collect information about human rights problems from newspapers, magazines, professional journals, U.N. publications, government reports, letters, telegrams, phone calls, and visits.<sup>327</sup> Sources of information include church officials,<sup>328</sup> relatives of prisoners,<sup>329</sup> former prisoners or refugees,<sup>330</sup> missionaries,<sup>331</sup> labor unions,<sup>332</sup> opposition groups,<sup>333</sup> ex-

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326. Air fares alone often run into thousands of dollars. Members of NGO missions are rarely paid, but the sponsoring organization pays the cost of the mission's living expenses. Evidently disregarding the financial stringencies under which NGOs work, and relying upon the experience of the more wealthy IGOs, the Belgrade Rules naively propose: "Fact finding missions should operate with staff sufficient to permit the independent collection of data and should be assisted by such independent experts as the mission may deem necessary." Belgrade Rules, *supra* note 69, at 164, rule 10. Most NGO missions have no separate staff and rely entirely upon the efforts of the mission members.

327. AI, *Amnesty International Handbook* 7, 13 (1977); Weissbrodt, *International NGOs*, *supra* note 1, at 300. The Prisoner of Conscience Library at the AI Secretariat in London catalogues every week approximately 1,000 newspaper and magazine articles from 5 continents. See, e.g., *Argentina Admits It Holds Missing Rights Leader*, Wash. Post, Sept. 22, 1977, § A, at 24, col. 1; *Velasco, Dissolution of Chile's Police Agency: A Farce*, N.Y. Times, Sept. 7, 1977, at 37, col. 1; *Ex-Minneapolis Woman Jailed in Argentina*, Minn. Trib., May 18, 1976, § A, at 8, col. 3.

328. See, e.g., *Argentina Cracks Down on Jehovah's Witnesses*, Wash. Post, Nov. 25, 1978, § A, at 22, col. 5; *Chile Under Mounting Pressure From Church on Human Rights*, N.Y. Times, Nov. 16, 1978, § A, at 4, col. 3; *Pope Calls for 'Explanation' of Priests' Deaths in Argentina*, Wash. Post, Sept. 28, 1976, § A, at 10, col. 1; *7 Catholic Bishops Say San Salvador Persecutes Church*, N.Y. Times, May 23, 1977, at 7, col. 1.

329. Amnesty International has developed a form by which relatives of prisoners may inform the AI Research Department about the prisoner. AI USA, *Addendum to the Amnesty International Handbook* 20 (1978); see note 27 *supra*.

330. See note 28 *supra*.

patriate groups,<sup>334</sup> concerned public officials,<sup>335</sup> lawyers,<sup>336</sup> journalists,<sup>337</sup> and other NGOs. Church-sponsored human rights organizations often obtain a wealth of information through a web of personal contacts created by their missionary organizations.<sup>338</sup> Older organizations have clippings files and dossiers on human rights violations dating back ten or twenty years.<sup>339</sup> AI has the

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331. See, e.g., AI, *The Republic of Nicaragua 27-28* (1977); *American is Abducted in Argentina*, N.Y. Times, Sept. 17, 1976, § A, at 3.

332. See, e.g., *Wave of Murders Shatters Leftist Opposition in Guatemala*, Wash. Post, April 13, 1979, § A, at 10, col. 1; *Peruvians Swing Away From Left*, N.Y. Times, Dec. 24, 1976, § A, at 1, col. 2.

333. See note 28 *supra*.

334. For example, the Committee for Human Rights in Rumania is primarily an expatriate group. The Committee has worked together with the International Human Rights Law Group to protest discrimination against the Hungarian ethnic minority in Rumania. See International Human Rights Law Group, *Petition to the United Nations Commission on Human Rights and Sub-Commission on Prevention of Discrimination and Protection of Minorities: Human Rights Violations in the Socialist Republic of Rumania* (June 27, 1979) (copy on file with the authors).

Similarly, a group of Soviet citizens joined together to promote the implementation of the 1975 Helsinki Accords. See 6 *Basket Three: Implementation of the Helsinki Accords: Hearing Before the Commission on Security and Cooperation in Europe*, 95th Cong., 2d Sess. 117-18 (1978); Leary, *Helsinki Final Act*, *supra* note 1, at 121-24.

335. See, e.g., *House Hearings on International Protection of Human Rights*, *supra* note 1, at 533, 541-42 (testimony of Prof. Newman, who headed an AI mission to Chile and obtained information from Indian and Swedish diplomats in Santiago); *A Challenge Shapes Up for Pinochet*, Christian Science Monitor, April 5, 1978, at 6, col. 1; *Amin's Ex-Aide: Quitting Means Death*, Wash. Post, Sept. 24, 1977, § A, at 16, col. 2; *Argentina Beset by Arrest Queries*, N.Y. Times, Aug. 13, 1976, § A, at 5, col. 1; *Chilean Charges General Ordered American's Death*, Wash. Post, June 10, 1976, § A, at 21, col. 4; *Chilean Officials Say Police Had Part in 'Disappearances'*, Wash. Post, May 25, 1977, § A, at 31, col. 1.

336. See, e.g., AI, *Report of an Amnesty International Mission to Spain 3* (1975); *Argentine Lawyers Finding Peril in Leftist Causes*, N.Y. Times, July 18, 1977, at 3, col. 4.

337. See, e.g., Russell, *Argentina: Living with Ghosts*, Newsweek, July 20, 1981, at 38-40 (Former newspaper publisher Jacobo Timmerman has published numerous works regarding human rights violations by the Argentine government.).

338. See Note, *supra* note 1, at 488 (Church groups have over 12,000 missionaries in Latin America.).

339. Weissbrodt, *International NGOs*, *supra* note 1, at 300. AI representatives have briefly described the organization's fact-finding methods:

We would also like to indicate some of the factors which may influence human rights reporting.

The first requirement of any human rights assessment is precise, factual information on specific violations. AI's Research Department, which is based in London, consists of 60 professional and secretarial staff; the researchers are appointed for their knowledge of a particular country or region, linguistic skills, and the ability to arrive at objective judgments on the basis of material gathered from a wide variety of public and private sources, few of whom will be entirely disinterested. AI's research is set within the narrow focus of the organization's mandate. It identifies individual prisoners of conscience, obtains and assesses

largest research capability of any NGO, having over 150 persons at its international Secretariat in London, in addition to personnel at national section offices. Both AI and the ICJ obtain reports from lawyers and use on-the-scene observers to verify the information received by staff. NGOs receive information in a much less structured fashion than do IGOs. ECOSOC,<sup>340</sup> ILO,<sup>341</sup> UNESCO,<sup>342</sup> the

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reports of torture on an individual as well as a systemic basis, it examines political and legal systems as they affect political imprisonment, prepares country reports both for publication and for submission to the United Nations human rights machinery; the researchers organize missions to particular countries and design public and diplomatic initiatives for the release of prisoners, the abolition of the death penalty and the reform of legal procedures and prison conditions.

Sources of information will vary from country to country; they will normally include such public material as press reports, texts of laws and decrees, UN and other international organization reports, and unpublished testimony from relatives of victims, former prisoners, lawyers, opposition groups, church people, journalists, and academics.

Compared with other research areas, the collection of information on human rights violations encounters particular difficulties. Research will inevitably focus on the point of conflict between a government and its critics, both of whom have an interest in presenting their own point of view. The bias of a political movement is usually obvious, but that of a government is equally dangerous. To a far greater degree than in other areas, governments are not objective sources for information on domestic human rights questions. Indeed, in most instances where political prisoners are detained, the provision of data about their identity and treatment will seem to run directly counter to the national interest. The natural tendency of any government is to discourage information which would harm its reputation. Indeed, since the passage of legislation linking the receipt of U.S. aid to human rights observance, a bad reputation in this area can cause the loss of economic or military assistance.

Information on human rights violations must therefore be sought in other ways. It is our experience that a number of factors will influence the process of information collection for a particular country. Where all are absent, as in Ethiopia or Guinea, it will be extremely difficult to establish the existence and extent of violations with any precision.

Human Rights in Africa: Hearing Before the Subcomms. on Africa and on International Organizations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 25, 34 (1979) (statement of V. McGee and S. Grant). The most significant factors listed were the following: (1) whether there exists a popular awareness of the existence of human rights and a belief that basic rights should not be violated; (2) whether an individual human rights victim can be confident that the reporting of a violation will not itself lead to further reprisals, for example, under laws which forbid human rights reporting; (3) whether there exists a strong, independent judiciary; (4) whether there exist local human rights organizations to which violations can be reported; (5) whether the press can report freely on human rights matters; (6) whether the common language is one easily understood by foreigners; (7) whether there exists a strong refugee or expatriate community. *Id.* at 34-35.

340. International Covenant on Economic, Social and Cultural Rights, art. 16, opened for signature Dec. 16, 1966, G.A. Res. 2200 (Annex), 21 U.N. GAOR Supp. (No. 16) at 49, 51, U.N. Doc. A/6316 (1967) (entered into force Jan. 3, 1976).

341. See notes 137-92 *supra* & accompanying text.

U.N. Human Rights Committee,<sup>343</sup> and the U.N. Commission on Human Rights<sup>344</sup> are authorized to receive government reports containing human rights information. These reports, obviously, are of limited value. Individual complaints are accepted by the Inter-American Commission on Human Rights with a minimum of restrictions,<sup>345</sup> and by UNESCO,<sup>346</sup> by the European Commission,<sup>347</sup> the ILO,<sup>348</sup> and other U.N. bodies to a limited extent.<sup>349</sup> The European Commission and the United Nations also accept NGO reports and complaints to some extent,<sup>350</sup> whereas such reports are received without limitation by the Inter-American Commission.<sup>351</sup> The ILO receives information from individuals, labor unions, and other NGOs.<sup>352</sup> All IGOs have provisions for requesting informa-

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342. J. Carey, *supra* note 95, at 129-30.

343. International Covenant on Civil and Political Rights, art. 40, opened for signature Dec. 16, 1966, G.A. Res. 2200 (Annex), 21 U.N. GAOR Supp. (No. 16) at 49, 52, U.N. Doc. A/6316 (1967) (entered into force March 23, 1976).

344. E.S.C. Res. 1074C, 39 U.N. ESCOR Supp. (No. 1) at 24, 25, U.N. Doc. E/4117 (1965). This reporting system was slightly amended by E.S.C. Res. 1230, 42 U.N. ESCOR Supp. (No. 1) at 12, U.N. Doc. E/4393 (1967). See also J. Carey, *supra* note 95, at 128.

345. See notes 193-212 *supra* & accompanying text.

346. See Study of the Procedures Which Should Be Followed in the Examination of Cases and Questions Which Might Be Submitted to UNESCO Concerning the Exercise of Human Rights in the Spheres of its Competence, in Order to Make Its Action More Effective, 102 UNESCO Executive Board, UNESCO Doc. 102 EX/19, at 61-65 (1977) [hereinafter cited as UNESCO Study]. See also Marks, UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture, and Communication, 13 Tex. Int'l L.J. 35, 60-62 (1977).

347. See notes 213-24 *supra* & accompanying text concerning the European Convention.

348. See notes 137-92 *supra* & accompanying text concerning the ILO.

349. See E.S.C. Res. 1503, 48 U.N. ESCOR Supp. (No. 1A) at 8, U.N. Doc. E/4832/Add. 1 (1970); E.S.C. Res. 1296, 44 U.N. ESCOR Supp. (No. 1) at 22, 24, U.N. Doc. E/4548 (1968); E.S.C. Res. 1235, 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (1967); E.S.C. Res. 728F, 28 U.N. ESCOR Supp. (No. 1) at 19, U.N. Doc. E/3290 (1959). See generally Weissbrodt, International NGOs, *supra* note 1, at 312 n.87; Cassese, The Admissibility of Communications to the United Nations on Human Rights Violations, 5 Revue de Droits de L'Homme 375, 377-78 (1972); Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories, U.N. Doc. E/CN.4/1317 (1979); see also Optional Protocol to the International Covenant on Civil and Political Rights, arts. 1-5, G.A. Res. 2200 (Annex), 21 U.N. GAOR Supp. (No. 16) at 49, 59, U.N. Doc. A/6316 (1966) [hereinafter cited as Optional Protocol].

350. Carey, Human Rights Procedures, *supra* note 95, at 314 n.115; see Weissbrodt, International NGOs, *supra* note 1, at 315 n.101. See also note 346 *supra*.

351. Regulations of the Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 26, arts. 37, 53 (1967). See also T. Buergenthal & J. Torney, International Human Rights and International Education 73-75 (1976); notes 193-212 *supra* & accompanying text concerning the Inter-American Commission.

352. See J. Carey, *supra* note 95, at 132-33. See also E. Landy, *supra* note 140, at 182-91;

tion from accused governments at preliminary stages.<sup>353</sup>

NGOs would not benefit in any way from the adoption of IGO-type restrictions on the initial sources of their information. Indeed, one of the great strengths of NGOs is their ability to obtain news about human rights violations quickly through their informal information networks. NGOs serve not only as passive recipients of complaints and information, but also actively monitor the observance of human rights in various parts of the world.<sup>354</sup> Limitations on the sources of information they could use would only hamper NGOs in serving as human rights catalysts.

## 2. *Sources of Information for Inquiry Missions*

In contrast to background fact-finding by Secretariats, IGOs and NGOs use similar procedures for fact-finding by missions of inquiry. Both NGO and IGO commissions take an active role in gathering the evidence required to fulfill their terms of reference. For example, the first action of the U.N. *Ad Hoc* Working Group of Experts on South Africa was to ask all U.N. member States for information, particularly the names of possible witnesses, and to issue a communique through the U.N. Office of Public Information inviting contact from "all the persons who believe that they could provide specific and relevant information on this matter, in particular those who have been 'imprisoned or detained for opposing or violating the policies of apartheid.'"<sup>355</sup> In its third inquiry into South Africa, the *Ad Hoc* Group of Experts in 1969 solicited names of witnesses and information not only from member States and the

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notes 137-92 *supra* & accompanying text concerning the ILO.

353. See E.S.C. Res. 1503, 48 U.N. ESCOR Supp. (No. 1A) at 8, U.N. Doc. E/4832/Add. 1 (1970); UNESCO Study, *supra* note 346, at 63-64 (1977); Optional Protocol, *supra* note 349, art. 4; Marks, *supra* note 346, at 61; Wiebringhaus, *Jurisprudence et Procédure du Comité des Ministres du Conseil de l'Europe en Vertue du Premier Paragraphe de l'Article 32 de la Convention Européenne des Droits de L'Homme*, in *Mélanges offerts à Poly Modinos* 454, 474-75 (1968). See also notes 137-92 *supra* & accompanying text (approach of the ILO); notes 193-212 *supra* & accompanying text (approach of the Inter-American Commission on Human Rights).

354. See, e.g., Scoble & Wiseberg, *Amnesty International: Evaluating Effectiveness in the Human Rights Arena*, Intellect, Sept.-Oct. 1976, at 79, 81-82; Weissbrodt, *International NGOs*, *supra* note 1, at 300; Note, *supra* note 1, at 488. The Belgrade Rules support the view that at the initial stage of a mission's inquiry, "all material relevant to the purpose of the mission should be made available to it." Belgrade Rules, *supra* note 69, at 164, rule 9.

355. Report of the *Ad Hoc* Working Group of Experts set up under Resolution 2(XXIII) of the Commission on Human Rights, U.N. Doc. E/CN.4/950 (1967); J. Carey, *supra* note 95, at 100.



general public, but from the Organization of African Unity and various private organizations, including some African liberation movements.<sup>356</sup>

The European Commission on Human Rights takes a less activist approach. For the most part it relies on witnesses and evidence presented to it by the applicant and the investigated government.<sup>357</sup> It retains, however, as does the International Court of Justice,<sup>358</sup> the right to call witnesses and gather other evidence on its own.<sup>359</sup> The European Commission has also engaged in a few on-the-spot investigatory visits.<sup>360</sup>

Almost all NGOs follow the practice of actively seeking information. Since there are no "parties" to NGO investigations, the commissions make use of information gathered by their Secretariats<sup>361</sup> and by persons who come forward with evidence on their own initiative or in response to publicity about the inquiry.<sup>362</sup> The commissions also direct specific requests for information to the concerned government,<sup>363</sup> church groups,<sup>364</sup> political parties,<sup>365</sup> and national

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356. Allegations Regarding Infringements of Trade Union Rights, U.N. Doc. E/4646, at 13 (1969); Question of the Violation of Human Rights and Fundamental Freedoms Including Policies of Racial Discrimination, U.N. Doc. E/CN.4/984, at 7 (1969); J. Carey, *supra* note 95, at 114.

357. For example, in the "Greek Case," a list of witnesses was submitted by the Greek government and the Applicant States (Denmark, Norway, Sweden, and the Netherlands). The Sub-Commission summoned 30 of these witnesses to its hearings. 1 Council of Europe, *supra* note 223, pt. 1, at 51 (list of witnesses proposed but not called).

358. See Rules of the International Court of Justice, art. 59, reprinted in I.C.J. Acts and Documents, No. 3, at 93, 127 (1977). See also Alford, Fact-Finding by the World Court, 4 Vill. L. Rev. 37, 67-74, 85-86 (1958); Foster, Fact Finding and the World Court, 7 Can. Y.B. Int'l L. 150, 171-81 (1969).

359. European Rules, *supra* note 218, rules 54, 64.

360. See notes 218-42 *supra* & accompanying text.

361. See, e.g., AI, Indonesia 144-46 (1977); AI, Islamic Republic of Pakistan 11-12 (1977); AI, The Republic of Nicaragua 5 (1977); International Commission of Jurists, The Events in East Pakistan, 1971, at 5-6 (1972) [hereinafter cited as East Pakistan].

362. See, e.g., U.N. Human Rights Law and Its Enforcement: Chile: Hearings Before the Subcomms. on Inter-American Affairs and International Organizations and Movements of the House Comm. on Foreign Affairs, 93d Cong., 2d Sess. 16-17 (1974) (response of Chile's U.N. representative to inquiries by the U.N. Commission on Human Rights).

363. See, e.g., AI, Report of an Amnesty International Mission to Spain 4 (1975); AI Mission to Sri Lanka, *supra* note 39, at 17; B. Stephansky & D. Helfeld, *supra* note 30, at 2-6.

364. AI, Chile 5, 46 (1974); International Commission of Jurists, Racial Discrimination and Repression in Southern Rhodesia i, 60 (1976); Human Rights in El Salvador, *supra* note 294, at 14-16.

365. See, e.g., AI Mission to Korea, *supra* note 276, at 28-29; AI, The Republic of Nicaragua 31 (1977); B. Stephansky & D. Helfeld, *supra* note 30, at 6.

humanitarian organizations.<sup>366</sup>

A complete picture of a human rights situation is very difficult to achieve since it depends largely on the initiative of persons who have enough interest and courage to come forward. Since those concerned with human rights violations are most often victims or members of political parties and other organizations opposed to certain governments,<sup>367</sup> it is necessary to have procedures in accordance with which the evidence presented is subjected to careful scrutiny and to encourage as complete a presentation of the concerned government's case as possible.

Rule 17 of the U.N. Draft Model Rules explicitly provides for full cooperation with the concerned State.<sup>368</sup> It requires that the ad hoc body request from the concerned State a list of witnesses and experts it wishes the body to hear. The rule also allows the State to make statements to the body, submit written materials, and respond to written or oral evidence.<sup>369</sup> Although NGOs have not explicitly adopted such procedures, they, for the most part, actively solicit governmental cooperation.<sup>370</sup> Governments are approached concerning the establishment of an inquiry commission, they are regularly asked to submit documents and names of witnesses, and are invited to comment on information received by the commissions.<sup>371</sup> NGOs have not been totally without success in achieving a degree of cooperation with concerned governments.<sup>372</sup>

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366. See, e.g., International Commission of Jurists, *Racial Discrimination and Repression in Southern Rhodesia* 47 (1976); B. Stephansky & D. Helfeld, *supra* note 30, at 4-6.

367. See, e.g., AI, *Chile* 16 (1974); AI, *Indonesia* 20-30 (1977).

368. See Draft Model Rules of Procedure, *supra* note 124, at 9-10.

369. *Id.* at 10, rule 17(e); cf., *Belgrade Rules*, *supra* note 69, at 164, rule 12 (providing the State concerned an opportunity to comment in writing on evidence obtained independently by the fact-finding mission or submitted in writing by a petitioner).

370. See, e.g., AI, *Islamic Republic of Pakistan* 5 (1977); *Torture in Brazil*, *supra* note 27, at 2; *East Pakistan*, *supra* note 361, at 5.

371. See, e.g., AI *Mission to the Philippines*, *supra* note 29, at 11, 65-84; B. Stephansky & D. Helfeld, *supra* note 30, at 5-6. See also Report of the *Ad Hoc* Working Group of Experts on Violations of Human Rights in Southern Africa, U.N. Doc. E/CN.4/1311 at 4 (1979).

372. See, e.g., AI *Mission to Sri Lanka*, *supra* note 39, at 17; R. Goldman & D. Jacoby, Report of the Commission of Enquiry to Mexico 1-5 (Dec. 1978) (report submitted to the International League for Human Rights, the Fédération Internationale des Droits de l'Homme, and Pax Romana) [hereinafter cited as *Pax Romana Mission*]; cf. Bissel, *The International Committee of the Red Cross and the Protection of Human Rights*, 1 *Revue des Droits de l'Homme* 255, 272-74 (1968). But see AI *Mission to Argentina*, *supra* note 68, at 5-6 (The mission received some cooperation from the Argentine government, but progress was hampered by government policemen, who, while purporting to protect mission members, intimidated and detained witnesses.).

a. *On-Site Observation*

There are several kinds of NGO on-site missions, including diplomatic contacts,<sup>373</sup> trial observations,<sup>374</sup> after-the-fact investigations,<sup>375</sup> fact-finding in the context of on-going human rights violations,<sup>376</sup> and mixtures of these sorts of efforts.<sup>377</sup> Missions may enjoy varying degrees of cooperation from governments, may present distinct investigative problems, and may thus require different fact-finding procedures. On-site visits both provide useful information and lend credibility to the conclusions of fact-finding missions. Occasionally, they afford some temporary relief in individual cases through the mere presence of outside observers. On-the-spot investigations can also provide the sort of fresh information that may be necessary for prompt remedial action.

The International Committee of the Red Cross is one of the most active NGOs engaged in on-site fact-finding. With a staff of about 700 around the world,<sup>378</sup> ICRC delegates have visited hundreds of places of detention in the last 30 years.<sup>379</sup> Among the con-

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373. See, e.g., AI, Amnesty International Mission to Rhodesia January 1980, at 1, 2, 7-8 (1980); AI, Amnesty International Report 1979, at 136-40 (1979) (AI delegation to Romania).

374. See, e.g., AI, Countries in Which Facilities Have Been Given to Amnesty International Delegates to Attend Trials or Interview Prisoners, 1963-1969 (1969) (unpublished memo on file with the authors); International Commission of Jurists, 1971-1977, at 31-35 (1977) (unpublished memo on file with the authors); Fédération Internationale des Droits de l'Homme, Mission d'Observation Judiciaires et d'Enquêtes sur les Droits de l'Homme (undated) (copy on file with the authors); J. Julien, *Observateurs: Étude des Rapports* (1979) (unpublished memo on file with the authors); note 265 *supra* & accompanying text.

375. See, e.g., AI Israel-Syria Report, *supra* note 292; International Commission of Jurists, South African Incident: The Ganyile Case 1962 (1962).

376. See, e.g., AI Mission to Argentina, *supra* note 68, at 48; AI Mission to Sri Lanka, *supra* note 39, at 5; Pax Romana Mission, *supra* note 372, at 1; B. Stephansky & R. Alexander, *supra* note 272, at 1; B. Stephansky & D. Helfeld, *supra* note 30, at 1.

377. See, e.g., AI, Islamic Republic of Pakistan 5-6 (1977). If an NGO undertakes an on-site mission, it should describe its activities. A detailed account of a mission's activities may be found in Report of the United Nations Visiting Mission to Guam, 1979, U.N. Doc. A/AC.109/L.1345, at 34-41 (1979). See also U.N. Doc. A/AC.109/L.1326 (1979); U.N. Doc. A/AC.109/582 (1979).

378. International Committee of the Red Cross, Annual Report 1978, at 67 (1979).

379. The ICRC carried out 93 prison visits during the period from 1952 to 1961, 66 of which involved political detainees or victims of internal conflicts. From 1962 to 1971 ICRC delegates made 169 prison visits of which 132 involved victims of political or internal strife. G. Utler, International Committee of the Red Cross: A Study in Conflict Management 336-37 (1974). See generally Berlins, *Neutral Eye Kept on Detainees*, *The Times* (London), May 8, 1978, at 12; Rollow, *The International Red Cross Quietly Aids Political Prisoners*, *Wash. Post*, May 13, 1978, § A, at 14; see also Comité International de la Croix-Rouge, *Model Memorandum* (unpublished I.C.R.C. Doc. DO-1327, Annex III, undated) (copy on file with

ditions for ICRC on-site visitation are: (1) access to all places of detention, (2) freedom to speak privately with any detainees, (3) the government's provision of ICRC with a list of detainees before the visit, (4) authorization to repeat visits as needed, and (5) authorization to distribute material assistance to needy detainees.<sup>380</sup> Nevertheless, the ICRC has carried out a few visits even when governments have not acceded to all of these conditions.<sup>381</sup>

Despite the emphasis in this and other discussions of NGOs on on-site investigations, most human rights fact-finding is done without such visits.<sup>382</sup> Fact-finding missions are too expensive to be used very widely and may require at least the acquiescence, if not the assistance, of the government subject to scrutiny. Such cooperation is not always forthcoming.<sup>383</sup> Because of these difficulties, the great bulk of human rights fact-finding by both IGOs and NGOs is accomplished without on-site visits.

It should not be presumed, however, that on-site visits are always necessary for effective fact-finding. First-hand evidence is frequently available outside the country being investigated; refugees may provide their testimony; legal documents are usually available; complaints are often smuggled out of the subject country; the government may be asked to respond to accusations in writing or through diplomats; the long-distance telephone is a very effective investigative tool; and testimony may be taken from other

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the authors) [hereinafter cited as ICRC Model Memorandum].

Delegates of the International Committee of the Red Cross normally begin their inquiry by talking with the Superintendent of the prison facility. They next visit the prison facility and then interview the prisoners. Finally, they undertake further discussions with the Superintendent with a view to continuing visits so as to monitor progress.

380. See D. Forsythe, *supra* note 20, at 268-70; note 379 *supra*.

381. See International Committee of the Red Cross, Press Release No. 1303 (Sept. 19, 1977).

382. See generally AI, Amnesty International Report 1978, at 29-31 (1979). Over 230 pages in this Annual Report are devoted to country-by-country analyses, most of which were prepared without the aid of an on-site visit; only two or three pages list the AI missions.

383. See *Torture in Brazil*, *supra* note 27, at 3 (Brazil has consistently refused requests by AI and the OAS for permission to send fact-finding missions.); AI, Amnesty International Report 1977, at 72-73 (1977) (Ghana refused permission for AI observer to attend trial.). See generally Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Chile, O.A.S. Doc. OEA/Ser.L/V/II.37, doc. 19 corr. 1, at 4-8 (1976); J. Carey, *supra* note 95, at 122-23 (1970); Bos, *supra* note 285, at 237-42; Norris, *supra* note 14, at 9-10 (draft) (Haiti refused to grant consent for the Commission to visit.); Shefi, *The Protection of Human Rights in Areas Administered by Israel: United Nations Findings and Reality*, 1973 Israel Y.B. on Human Rights 337, 338-40; see also Report of the *Ad Hoc* Working Group of Experts on Violations of Human Rights in Southern Africa, U.N. Doc. E/CN.4/1311 at 4 (1979).

visitors to the country.<sup>384</sup> While these fact-finding approaches may not all be as reliable as direct observation, human rights organizations can and do achieve reliable results without on-site visits.<sup>385</sup> An example of such a fact-finding effort may be found in the AI Report on Brazil.<sup>386</sup>

Furthermore, on-site investigation may actually be less reliable than other methods of inquiry in some cases. Governments often shift prisoners, cordon off potential witnesses, prevent access to prisons, and otherwise prevent missions from access to accurate information during the necessarily short period of their visits.<sup>387</sup> Governments cannot as easily control the availability of information when the fact-finders are gathering evidence over a long period outside the subject territories. Visits by organizations have also tempted governments to exploit NGO involvement in human rights cases. On several occasions, governments have tried to make the presence of the ICRC within their countries appear as an expression of approval of governmental activity.<sup>388</sup> This problem has

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384. See, e.g., International Commission of Jurists, *Uganda & Human Rights* 5-6, 105-08 (1977); East Pakistan, *supra* note 361, at 5-6; AI, *Prisoners of Conscience in the USSR: Their Treatment and Conditions* 14 (1975).

385. See note 384 *supra*.

386. See *Torture in Brazil*, *supra* note 27.

387. AI, *Chile* 19-23 (1974); see, e.g., de Onis, *Human Rights Group Opens Inquiry in Argentina*, N.Y. Times, Sept. 7, 1979, § A, at 3, cols. 1-3; note 436 *infra*. Although the ICRC demands access to *all* places of detention, ICRC Model Memorandum, *supra* note 379, it sometimes settles for less. See D. Forsythe, *supra* note 20, at 65; note 381 *supra*. Compare AI, *Indonesia* 71-75 (1977) (describes steps taken by the Indonesian Government to transfer prisoners before an ICRC visit) and *Indonesia*, Int'l Comm'n Jurists Rev., June 1977, at 3-5 with *Visits to Places of Detention in Indonesia*, ICRC Bull., Aug. 1, 1979, at 4.

The ICRC insists upon regular visits to prisons in order to deter such evasive conduct. See, e.g., Comité International de la Croix-Rouge, *Rapport de Synthèse Faisant Suite à la Troisième Série de Visite des Délégués du Comité International de la Croix-Rouge à 2041 Détenus de Sécurité, dont 118 Femmes, dans 20 Prisons Irlandaises* (Oct. 17, 1978).

388. The ICRC was attacked for political bias after the South Vietnamese government restricted access to places of detention and selectively published portions of ICRC reports. See Rodley, *supra* note 1, at 145. See also D. Forsythe, *supra* note 20, at 84 (Greek official claimed ICRC had helped public image of junta.). For a general discussion of the problems raised by the partial disclosure of ICRC reports, see notes 499-502 *infra* & accompanying text. Since some government officials view the mere undertaking of ICRC visits as a guarantee of decent detention conditions and are alarmed only when the ICRC decides against visitation, a failure to publish the actual findings of the ICRC often may serve to support the investigated government's claims of good conduct. See D. Forsythe, *supra* note 20, at 225; The International Committee of the Red Cross and *Torture*, Int'l Rev. Red Cross, Nov.-Dec. 1976, at 2, 5 [hereinafter cited as ICRC and *Torture*]. See generally J. Becket, *Barbarism in Greece* xii, 102 (1970).

led to attacks on the ICRC.<sup>389</sup>

### b. *Oral Evidence*

All fact-finding missions rely on both oral and written evidence. Oral testimony is the backbone of both inquiry and adjudication. It has traditionally been considered of utmost reliability because it allows a finder of fact to listen to and immediately question a witness, and to evaluate demeanor and credibility.<sup>390</sup>

A major consideration facing fact-finding bodies is the manner in which to receive oral testimony. There are advantages and disadvantages to having such testimony taken before the entire body. Under the U.N. Draft Model Rules<sup>391</sup> and European Commission on Human Rights rules,<sup>392</sup> commission meetings at which evidence is received are governed by quorum requirements. Nevertheless, rule 23 of the U.N. Draft Model Rules and article 51 of the European Commission Rules of Procedure permit testimony to be taken by one or more designated members.<sup>393</sup> This exception to the quorum rule allows oral testimony to be reduced to a written deposition or permits a summary form for the majority of commission in the interests of time and expense.<sup>394</sup>

Quorum strictures pose problems for financially-limited NGO missions consisting of only two or three persons. In the face of a large number of tasks to be completed in a short time, the pressure toward achieving "a more complete picture" is very strong. Thus, it may be impractical to require that oral testimony be heard by the entire mission. It may also be necessary for only one member to hear testimony if the witness refuses to talk to anyone else,<sup>395</sup> or

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389. See J. Becket, *supra* note 388, at 102 (1970); Report of the *Ad Hoc* Working Group of Experts Set Up Under Resolution 2 (XXIII) of the Commission on Human Rights, U.N. Doc. E/CN.4/950 at 39(1967); Defense and Aid Prisons, *supra* note 21, at 1-5.

390. See J. Ralston, *The Law and Procedure of International Tribunals* 216-17 (1926). Cf. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (The jury may "judge by his demeanor upon the stand and the manner in which he gives his testimony whether [the witness] is worthy of belief.").

391. See Draft Model Rules of Procedure, *supra* note 124, at 6, rule 8.

392. European Rules, *supra* note 218, rule 25.

393. See Draft Model Rules of Procedure, *supra* note 124, at 12; European Rules, *supra* note 218. The Belgrade Rules recognize that missions may be more effective when operating in groups smaller than the whole mission membership. Belgrade Rules, *supra* note 69, at 165, rule 20.

394. See Draft Model Rules of Procedure, *supra* note 124, at 12, rule 23.

395. For instance, the President of El Salvador would meet only with Congressman Drinan and not with the other two members of the Unitarian Universalist Service Commit-

if witnesses are available only in a distant country. Most NGOs cannot afford the globe-trotting example (New York, London, Geneva, Conakry, Kinshasa, Brazzaville, Lusaka and Dar es Salaam) of the U.N. *Ad Hoc* Working Group of Experts on Southern Africa.<sup>396</sup> Nevertheless, it should remain the goal of inquiry missions to receive and weigh oral testimony as a body in order to add credence to group conclusions.

There are various procedures governing the conduct of witnesses and commission members during the giving of testimony. In IGO fact-finding, an oath or affirmation is usually required,<sup>397</sup> and the witness establishes his or her credentials.<sup>398</sup> The U.N. Draft Model Rules call for the mission's terms of reference to be explained and for preliminary questions to be put to the witness.<sup>399</sup> The witness is allowed to make a statement before submitting to questioning at the direction of the Chair.<sup>400</sup> The witness may be excluded from the proceedings after giving testimony.<sup>401</sup> The Hague Convention of 1907 provides several other helpful rules. Under the Convention, the witness is not allowed to read a statement or answer from a written draft in presenting evidence, except to consult notes and documents.<sup>402</sup> Also, the witness is asked to sign the transcript of his or her testimony.<sup>403</sup>

It is difficult to ascertain the extent to which such procedures are followed by NGO fact-finding commissions since details of NGO procedure are not spelled out either in reports or in organization handbooks. A standard procedure should be adopted by each NGO, but NGOs can be expected to be somewhat more informal than IGO commissions. Since written statements can be considered at leisure, adoption of the Hague rule regarding the use of written statements<sup>404</sup> would allow a fact-finding commission to devote the short time allotted for oral testimony to the questioning of

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tee mission to El Salvador. Human Rights in El Salvador, *supra* note 294, at 23-24.

396. See generally Report of the *Ad Hoc* Working Group of Experts on Violations of Human Rights in South Africa, U.N. Doc. E/CN.4/1311, at 3-6 (1979).

397. See Draft Model Rules of Procedure, *supra* note 78, at 11, rule 22(a); European Rules, *supra* note 218, at 80, rule 55. But see notes 193-212 *supra* & accompanying text concerning the Inter-American Commission on Human Rights.

398. See Draft Model Rules of Procedure, *supra* note 124, at 11, rule 22(b).

399. *Id.*

400. *Id.* rule 22(c).

401. *Id.* rule 23(d).

402. Hague Convention of 1907, *supra* note 76, art. 27.

403. *Id.* art. 28.

404. *Id.* art. 19.

witnesses.

A difficult problem for all human rights investigation is providing protection for persons who come forward and give oral testimony, especially in hearings within the country under investigation. In some instances, the public nature of hearings renders futile any attempt to preserve the anonymity of witnesses or the confidentiality of testimony. Both NGO and IGO fact-finding missions have routinely found it necessary, however, to receive testimony privately and for witnesses to remain anonymous.<sup>405</sup> While these measures have helped, they have not prevented governments from surrounding commissions' temporary headquarters,<sup>406</sup> arresting prospective witnesses,<sup>407</sup> roughing up people as they enter or leave the site of a commission,<sup>408</sup> and detaining, torturing, or killing witnesses after their testimony.<sup>409</sup> NGOs are helpless in the face of such tactics except to complain publicly<sup>410</sup> or to cancel hearings in the event that witnesses are subjected to danger. In such situations it may be better to rely on written testimony or to interview witnesses only outside the country.

Another approach to the problem of witness protection is reflected in the Belgrade Rules, which would require that an NGO receive from a government assurances of non-retaliation before a fact-finding mission could proceed.<sup>411</sup> Unfortunately, NGOs have experienced great difficulty in obtaining and enforcing assurances

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405. In the Northern Ireland case, the European Commission on Human Rights held closed hearings at an airfield in Norway where anonymous witnesses testified while hiding behind screens. A. Robertson, *supra* note 96, at 179. Similarly, the ICRC almost always insists on private interviews during prison visits. See D. Forsythe, *supra* note 20, at 65; ICRC Model Memorandum, *supra* note 379. Israel agreed in 1977 to allow ICRC physicians to conduct medical examinations without witnesses whenever the ICRC feels it is necessary. See U.S. Dep't of State, Report on Human Rights Practices in Countries Receiving U.S. Aid: Report Submitted to the Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 565 (1979).

406. See, e.g., AI Mission to Argentina, *supra* note 68, at 6.

407. *Id.*; AI Mission to Korea, *supra* note 276, at 44 (Certain Korean ex-National Assemblymen were placed under house arrest before they could meet with mission members.).

408. See, e.g., AI Mission to Korea, *supra* note 276, at 44-45 (Brian Wrobel, a mission member, was forcibly restrained from entering the Supreme Court Building in Seoul.). See also note 286 *supra*.

409. See, e.g., AI Mission to Argentina, *supra* note 68, at 6 (Two witnesses were detained and others were threatened; the mission was accompanied by 16 armed men.); AI Mission to Korea, *supra* note 276, at 44-45 (Many students were detained and transported out of Seoul to prevent communication with the mission.); AI, Political Imprisonment in Spain (1973).

410. AI Mission to Argentina, *supra* note 68, at 5-6 (1977); Amnesty Charges Harassment, Wash. Post, Jan. 19, 1980, § A, at 16.

411. Belgrade Rules, *supra* note 69, at 164, rule 15.



that governments will not retaliate. To require such assurances as a condition precedent to NGO fact-finding would make it extremely difficult to establish a fact-finding mission. Governments would simply refuse to make promises concerning non-retaliation. Even were such promises made, an NGO has no guarantee that they will be fulfilled. Thus, there appears to be no reason for an NGO to adopt the approach to witness protection taken by the Belgrade Rules.

### c. *Written and Documentary Evidence*

Much of the written and documentary evidence used by fact-finding commissions is compiled and analyzed by Secretariat members. Legislation, court opinions, ordinances, regulations, press releases, government reports, newspapers, reports by other NGOs, letters, affidavits, depositions, pictures, and lists of names are gathered.<sup>412</sup> Ideally, writings, documents, and photographs used as evidence in reaching conclusions should be signed or otherwise authenticated. Such a procedure was effectively followed by AI in a report on Brazil based solely on depositions signed and dated by the deponent in the presence of two witnesses.<sup>413</sup> Most NGOs fail to impose similar requirements of authentication.<sup>414</sup>

### C. *Admission of Evidence*

International fact-finding bodies and arbitral tribunals have traditionally avoided the sort of restrictions on the admissibility of evidence that are recognized by common law courts.<sup>415</sup> Similarly,

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412. See, e.g., AI, Report of an Amnesty International Mission to the Federation of Malaysia 62-67 (1979); Association of the Bar of the City of New York, Report of the Mission of Lawyers to Argentina, April 1-7, 1979, at 2, 7-9, 20, 22-24 (1979); International Commission of Jurists, Uganda & Human Rights 105-08 (1977); East Pakistan, *supra* note 361; W. Shore, *supra* note 14, at 124-25.

413. Torture in Brazil, *supra* note 27, at 26.

414. The Commission of the Churches on International Affairs principally used notarized written statements and oral testimony in preparing its report on Nicaragua. Commission of the Churches on International Affairs, Human Rights Violations in Nicaragua, reprinted in U.N. Doc. E/CN.4/Sub.2/426, at 31 (1979). The U.N. *Ad Hoc* Working Group on South Africa was criticized for using unauthenticated documents. See Kaufman, *supra* note 91, at 762.

415. See generally D. Sandifer, Evidence Before International Tribunals 1-29, 176-96, 366-69, (rev. ed. 1975). "The restrictions upon admissibility of evidence sometimes encountered in municipal procedure (and connected with the system of jury trial) have no place in international adjudication, where the relevance of facts and the value of evidence . . . are left to the entire appreciation of the Court." S. Rosenne, *The Law and Practice of the Inter-*

international NGOs have adopted a very broad approach to admissibility in human rights fact-finding. Rules for the exclusion of evidence are ordinarily designed to narrow the issues for consideration by juries.<sup>416</sup> Since NGO fact-finding commissions are selected for their legal and factual expertise,<sup>417</sup> jury-oriented evidentiary rules are not necessary.<sup>418</sup> Exclusionary rules are sometimes also needed to discourage misconduct in gathering evidence, particularly in criminal trials.<sup>419</sup> This is rarely a problem for NGO fact-finding bodies.<sup>420</sup> Courts also use exclusionary rules to promote the reliability and integrity of the fact-finding process.<sup>421</sup> Instead of restricting admissibility, IGOs and NGOs engaged in human rights fact-finding have been disposed to consider all available evidence but to weigh the evidence very carefully.<sup>422</sup>

There are other factors indicating that a broad evidentiary approach is appropriate for NGOs. Since there are no "parties" to present opposing perspectives to an NGO fact-finding commission, the commission must actively pursue its own evidentiary leads without exclusionary limits.<sup>423</sup> Further, in regard to some typical subjects of investigation, such as allegations of torture and mistreatment, it is difficult for NGO fact-finding bodies to find witnesses able to give direct testimony which might be regularly ad-

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national Court 557 (1965); see, e.g., Bizerta Report, *supra* note 59, *passim*.

416. See 1 J. Wigmore, *Evidence* §§ 28, 29a (3d ed. 1940); D. Sandifer, *supra* note 415, at 176-78.

417. See notes 286-315 *supra* & accompanying text.

418. See D. Sandifer, *supra* note 415, at 12, 176-78; 1 J. Wigmore, *Evidence* §§ 152-53 (3d ed. 1940). See also Luneburg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 Va. L. Rev. 887 (1981).

419. See C. McCormick, *supra* note 268, at §§ 164-65; see, e.g., *Mapp v. Ohio*, 367 U.S. 643, 657-60 (1961) (Evidence obtained in violation of the Fourth and Fourteenth Amendments will be excluded from state courts.); *Benanti v. United States*, 355 U.S. 96, 100 (1957) (Evidence obtained by state or federal agents in violation of the Federal Communications Act is inadmissible in federal court.).

420. The International Court of Justice accepts evidence regardless of how it was obtained by the party introducing it. See Alford, *supra* note 358, at 80-81.

421. See generally C. McCormick, *supra* note 268, at §§ 164-66. The problem of whether evidence is inadmissible by reason of the means of its procurement was evidently posed to the Commission of Inquiry on Iran when it was presented with evidence seized in the U.S. Embassy and with the possibility of hearing testimony from U.S. diplomatic hostages. Cf. U.N. Press Release IR/11 (Mar. 3, 1980) (The U.N. Commission of Inquiry in Tehran accepted information released by the Iranian Minister for Foreign Affairs.).

422. See J. Carey, *supra* note 95, at 100-04; D. Sandifer, *supra* note 415, at 20, 180.

423. See, e.g., *AI Mission to Argentina*, *supra* note 68, at 26 (All statements could not be corroborated.); B. Stephansky & R. Alexander, *supra* note 272, at 16, 25.

missible in a domestic court.<sup>424</sup> Acts of torture and mistreatment by members of the police or armed services are often performed without any witnesses willing to testify and sometimes without the knowledge of higher authorities.<sup>425</sup> Victims may justifiably fear government reprisal against themselves or their families for testifying.<sup>426</sup> Accordingly, NGO fact-finders often need to rely upon hearsay statements, documents which are not fully authenticated, and justifiable inferences from indirect evidence. Such a broad approach to admissibility must, however, be accompanied by great care in assessing the veracity and reliability of the admissible evidence.

#### D. *Ensuring the Reliability of Evidence*

The broad approach to admissibility necessitates the use of procedures to ensure the reliability of the factual conclusions drawn by the fact-finding body from the evidence gathered. Such methods for achieving reliability include both procedures for the taking of evidence and considerations used in weighing the evidence.

##### 1. *Procedures for the Taking of Evidence*

###### a. *Testimony Under Oath or Affirmation*

The U.N. Draft Model Rules<sup>427</sup> and the rules for the U.N. *Ad Hoc* Working Group on Chile provide that all nongovernmental witnesses shall be sworn before testifying.<sup>428</sup> Although U.N. and nongovernmental bodies lack contempt and perjury prosecution power, it is believed that the taking of an oath at least impresses upon witnesses the seriousness of oral testimony.<sup>429</sup> Government

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424. See, e.g., 2 Council of Europe, *supra* note 223, pt. 1, at 12-17 (Commission discussed the difficulty of obtaining direct evidence.).

425. Torture usually takes place during interrogation. Human rights fact-finding missions, if allowed in at all, are permitted by States to visit places of detention, not interrogation centers. Two States which make partial exceptions to this policy are Israel and Greece. Israel has allowed the ICRC to visit detainees, outside the presence of Israeli observers, during the period of their detention and interrogation. See U.S. Dep't of State, Report on Human Rights Practices in Countries Receiving U.S. Aid 565 (1979). See also ICRC and Torture, *supra* note 388.

426. Franck & Cherkis, *supra* note 62, at 1504; see notes 405-09 *supra* & accompanying text.

427. Draft Model Rules of Procedure, *supra* note 124, at 11, rule 22(a).

428. Chile Rules, *supra* note 126, at 98, rule 15.

429. See D. Sandifer, *supra* note 415 at 300-02; 6 J. Wigmore, Evidence §§ 1816-17 (Chadbourn rev. 1976); Kaufman, *supra* note 91, at 755.

witnesses are not sworn apparently because some are of the view that government witnesses are expected to tell the truth and because others view government representatives as advocates who are not expected to be impartial, even under oath.

NGO fact-finding commissions rarely take sworn testimony from those whom they interview and generally do not attempt to reproduce the style of court proceedings.<sup>430</sup> The formality of oath-taking might have a chilling effect on human rights victims and other potential informants, who fear reprisal and often demand that their testimony not be attributed.<sup>431</sup> NGO fact-finding commissions thus generally rely upon polite probing, questioning, and cross-checking to assure the reliability of oral testimony.

### b. *Careful Questioning of Witnesses*

The Hague rules permit governments under investigation to put questions to witnesses at hearings by submitting inquiries through the chairperson of the fact-finding body.<sup>432</sup> The U.N. Draft Model Rules<sup>432</sup> and the European Commission rules<sup>434</sup> permit government counsel to question witnesses directly, although such direct exami-

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430. See, e.g., International Commission of Jurists, Report of the British Guiana Commission of Inquiry 16 (1965); Belgrade Rules, *supra* note 69, at 164 (Rules 13-18 concern the testimony of witnesses but contain no oath requirements.).

431. James Becket's account of the first AI mission to Greece in 1967 describes the problem with taking oaths, cross-examination, and other standard legal requirements:

In our search for information about prisoners, we began to hear tales of torture, but they were always secondhand—that is hearsay. It was only after ten days that a victim finally dared to speak to us, and only after the rendezvous had been carefully arranged in a safe place. She was a young woman . . . For someone who has been tortured, the only fate worse than death is the prospect of being tortured again, and that is exactly what those who were released were threatened with if they ever said a word to anyone about their experiences. We had hoped, rather naively, that torture victims would sign an affidavit to be kept with a reliable person abroad who could swear it was signed. But one look into this woman's eyes and any legalistic demands on her suffering were out of the question. She spoke only on the condition that we not know her name. She was as many others would be: her hands shook, she chain-smoked and she started at each sound from outside the room. At times in her story she broke down completely.

J. Becket, *supra* note 388, at x-xi.

432. Hague Convention of 1907, *supra* note 76, art. 26.

433. Rule 17(e) permits "states directly concerned by the subject of the study or investigation . . . [to] address written or oral evidence" and "in accordance with procedures adopted by the ad hoc body [to] put questions to witnesses at hearings . . ." Draft Model Rules of Procedure, *supra* note 124, at 10.

434. European Rules, *supra* note 218, rule 56(1).

nation rarely occurs in practice.<sup>435</sup> In human rights inquiries, victims are not formal parties represented by counsel, so that adversarial cross-examination only by government counsel would present the problem of an unbalanced elicitation of evidence. Further, witnesses may well be intimidated by government questioning. In addition, direct participation by the government in the questioning of witnesses may create an appearance of cooperation between the government and the fact-finding body, which neither may desire.<sup>436</sup> Accordingly, for reasons of apparent impartiality, fairness, and effectiveness, the fact-finding body ordinarily controls the questioning of witnesses.<sup>437</sup>

Since the State cannot ordinarily be represented in the examination of witnesses for fear of discouraging testimony, it has been suggested that some member of the fact-finding body examine witnesses from the government's point of view.<sup>438</sup> Careful questioning by a designated commission member would serve to highlight weaknesses of a witness's testimony. Assigning a member to such a "devil's advocate" role can be done more easily by intergovernmental fact-finding groups, since they have larger commissions and

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435. See D. Sandifer, *supra* note 415, at 303, 305.

436. For example, in May 1979 the U.S. Department of State sent a six-member "study team" to Haiti. The study team attempted to determine the situation of the 600 Haitians who had been returned to Haiti after a stay in the U.S. The team enjoyed considerable cooperation from the Haitian government, although it wisely chose not to be accompanied by Haitian government officials. Nevertheless, the team was able to see only 12% of the returnees. Because the study team was sent by the U.S. government and because all members of the study team were U.S. Government employees, it is quite possible that returnees were reluctant to talk candidly or at all with the study team. If the study team had enjoyed a different sponsorship or membership, the results of the study might have been different. R. Maxim, et. al., *State Department Study Team on Haitian Returnees* (1979) (unpublished memorandum on file with the authors); see *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 486-88 (S.D. Fla. 1980) (discussing the study team and its methodology for collecting data on human rights violations).

437. See D. Sandifer, *supra* note 415, at 306. NGOs obviously lack the subpoena power and the ability to punish perjury, but IGO fact-finders also generally lack these powers and have not been substantially inhibited in their fact-finding work. See Foster, *supra* note 358, at 171-73. See also Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations*, 47 Minn. L. Rev. 939, 988-94 (1963); Note, *Constitutional Rights and Administrative Investigations: Suggested Limitations on the Inquisitorial Powers of the Federal Agencies*, 58 Geo. L.J. 345, 346 (1969).

438. See J. Carey, *supra* note 95, at 109-10, 120-22; Kaufman, *supra* note 91, at 762-63. Cross-examination was used by the U.N. Special Committee on the Problem of Hungary. Report of the Special Committee on the Problem of Hungary, 11 U.N. GAOR Supp. (No. 18), U.N. Doc. A/3592 (1957); see Kaufman, *supra* note 91, at 752. But see Belgrade Rules, *supra* note 69, at 164, rule 14 (providing the concerned State with an opportunity to question the petitioners in public session).

staff.<sup>439</sup> NGOs have a problem in that missions often consist of only one or two persons.<sup>440</sup> Even when there are three people on a mission, they often separate to interview witnesses. The time and resources of mission members are usually too limited to permit the appointment of a "devil's advocate." Furthermore, there is a serious question whether a member of a fact-finding body can truly play a "devil's advocate" role—either for the human rights victims or for the government—without upsetting the Commission's appearance of impartiality, without frightening witnesses, and unless he is able actually to be briefed by his "client." In contrast, the U.N. Human Rights Committee and the U.N. Committee on the Elimination of Racial Discrimination have demonstrated a capacity for well prepared, insistent, and effective questioning of witnesses without specific designation of individual members as devil's advocates.<sup>441</sup>

Intergovernmental fact-finding proceedings are generally far more formal than similar efforts by NGOs, whose inquiries resemble interviews more than adjudicative hearings.<sup>442</sup> In some ways, NGO fact-finders conduct themselves like *juges d'instruction* in a civil law country.<sup>443</sup> The NGO questioner need not demonstrate facts to some independent body, such as a judge or jury, but both poses the inquiries and analyzes the responses.<sup>444</sup> Hence, the interviewer can get meaningful information through polite, and sometimes indirect questioning. Mildly suggestive or leading questions are used by IGOs to elicit information from witnesses<sup>445</sup> and could

439. The staff of U.N. Commissions have varied, but have been as large as fifty persons. See W. Shore, *supra* note 14, at 126.

440. See notes 312-14 *supra* & accompanying text.

441. See Buergenthal, Implementing the U.N. Racial Convention, 12 *Tex. Int'l L.J.* 187, 189, 218-19 (1977); Weissbrodt, United States Ratification of the Human Rights Covenants, 63 *Minn. L. Rev.* 35, 40 n.48, 44 n.67 (1978) [hereinafter cited as Weissbrodt, U.S. Ratification].

442. See AI Israel-Syria Report, *supra* note 292, at 8.

443. See generally Foster, *supra* note 358, at 189; Kaufman, *supra* note 91, at 759-60. But see Franck & Fairley, *supra* note 70, at 310.

444. Cf. Rosett, Trial and Discretion in Dutch Criminal Justice 19 *U.C.L.A. L. Rev.* 353, 367-68, 371-72 (1972) (illuminates breadth of judicial discretion in Dutch trial procedure). But see Goldstein & Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany, 87 *Yale L.J.* 240, 247-48 (1977); cf. Langbein & Weinreb, Continental Criminal Procedure: "Myth" and Reality, 87 *Yale L.J.* 1549, 1551 (1978) (rebut Goldstein and Marcus' criticism of the European inquisitorial model).

445. See, e.g., Report of the *Ad Hoc* Working Group of Experts Set Up Under Resolution 2 (XXIII) of the Commission on Human Rights, U.N. Doc. E/CN.4/950, at para. 170 (1967). For criticism of the use of leading questions by inquiry commissions, see J. Carey, *supra*

be employed by NGOs. Nevertheless, on some occasions, such as examination of governmental representatives, NGO fact-finders have needed to use more forceful questioning.<sup>446</sup>

Of course, the value of questioning witnesses has its limits. As stated by the AI Mission to Israel and Syria:

Sharp examination . . . was avoided for various reasons, the main one being that many of the former prisoners of war had been through traumatic experiences, including severe interrogations, and it would not have been very reasonable for an Amnesty International Commission to conduct the kind of cross-examination in which the truthfulness of statements was seriously challenged.<sup>447</sup>

Fact-finding bodies obviously have to moderate the tenor of their questions according to the witnesses before them. Examination should be used only to the extent that it assists in obtaining accurate information.

## 2. *Methods of Assessing the Reliability of Evidence*

### a. *Corroboration*

For international NGOs, corroboration is the most significant and commonly-used method for determining the reliability of human rights information.<sup>448</sup> Faced with unreliable or politically motivated informants and frequently with circumstantial evidence, the NGO attempts to sift its information for common patterns and corroborative data deriving from independent sources.<sup>449</sup> Usually working after the event and often at a great distance, the NGO

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note 95, at 111-12; Kaufman, *supra* note 91, at 759-62. Questioning by the Russell Tribunal on Vietnam often stated the desired response. See *Against the Crime of Silence*, *supra* note 275, at 507, 511, 535.

446. Kaufman, *supra* note 91, at 759-60. In order to question the witnesses successfully, the fact-finding commission must know a great deal before examining the witness. Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. Pa. L. Rev. 1083, 1088-90 (1975). Nevertheless, the commission must be wary of any tendency to establish a premature theory of the case and thus to be more receptive to evidence which fits that theory. *Id.*

447. AI Israel-Syria Report, *supra* note 292, at 9.

448. See Carey, *Human Rights Procedures*, *supra* note 95, at 308; Kaufman, *supra* note 91, at 752; see, e.g., AI Mission to Argentina, *supra* note 68, at 22, 23, 36; International Commission of Jurists, *Uganda & Human Rights* 5, 105 (1977).

449. See AI Mission to the Philippines, *supra* note 29, at 12; ICRC and Torture, *supra* note 388; note 448 *supra*. Some governments also engage in human rights fact-finding and must assess information from divergent sources. See, e.g., U.S. Dep't of State, *Report on Human Rights Practices in Countries Receiving U.S. Aid* 3 (1979).

must put a puzzling set of isolated pieces of information into a coherent picture.

Sometimes a commission receives corroborative physical evidence such as bruises, scars, and other physical evidence of torture,<sup>450</sup> although the passage of time often makes this type of evidence very difficult to acquire.<sup>451</sup> On-site visitation can provide an opportunity to verify witnesses' descriptions of buildings and rooms.<sup>452</sup> For example, the U.N. *Ad Hoc* Working Group on Chile was able to establish that the Villa Grimaldi had been used as a place of torture and detention after visiting a room whose blue tiled walls matched the walls in photos of prisoners published in three newspapers and in the description of the room given by a former prisoner.<sup>453</sup>

### b. *Use of Direct Evidence*

The European Commission on Human Rights decided in the Greek Case to impose a hearsay rule, not as a threshold requirement, but as a limitation on the evidence upon which final conclusions would be based.<sup>454</sup> It confined itself to evidence which it considered direct in one of three ways: "1) that the witness has claimed to have been himself subjected to torture or ill-treatment; 2) that the witness has seen its actual infliction on another person; 3) or that the witness has seen marks or traces on another person that could be attributed to torture or ill-treatment."<sup>455</sup> Also, the Commission considered only those documents that were authenticated or uncontested.<sup>456</sup> It did not consider statements by or about unidentified persons since it had no means of verifying the authenticity and veracity of such statements.<sup>457</sup> These evidentiary limita-

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450. See AI, *Evidence of Torture: Studies by the Amnesty International Danish Medical Group* 10-12, 20-26 (1977); AI, *Report on Torture* (2d ed. 1975); see, e.g., AI, *Chile* 58-59 (1974).

451. See authorities cited in note 450 *supra*.

452. The ICRC delegate who visited Bouboulinas Street prison in Athens was able to verify former detainees' testimony. See J. Becket, *supra* note 388, at 99-101.

453. Report of the Economic and Social Council, Protection of human rights in Chile, U.N. Doc. A/33/331 at Annexes I-V (1978).

454. See 2 Council of Europe, *supra* note 223, pt. 1, at 15.

455. *Id.*

456. *Id.*

457. *Id.* Such limitations are also present in the Belgrade Rules. Fact-finding missions may require that evidence be submitted in writing and contain specific, verifiable statements of fact. Belgrade Rules, *supra* note 69, at 164, rule 11.



tions had a drastic effect on the European Commission's report. The Commission was able to investigate only 30 of the 210 alleged cases, and found only 11 allegations conclusively proven.<sup>458</sup> These 11 cases, however, proven beyond a reasonable doubt,<sup>459</sup> provided a sufficient basis for a finding of a systematic pattern of torture and mistreatment by the Greek government.<sup>460</sup> The respect accorded the report no doubt stems from its solid evidentiary basis.<sup>461</sup>

Many NGO missions have applied this direct evidence standard in drawing their conclusions, without expressly adopting a direct evidence rule.<sup>462</sup> For example, the ICJ report on Uganda limited its account of events in Uganda to "firsthand eye witness reports . . . corroborated by two or more sources considered to be reliable."<sup>463</sup> Every mission tries, whenever possible, to base its findings on direct evidence. Most NGOs do not, however, exclude all findings based on hearsay testimony, especially where the testimony is consistent with other evidence available to the mission.<sup>464</sup> The advantage of a strict rule is clear—the facts can be stated with authority. But there are difficulties in applying the European Commission direct evidence rule to NGO missions. The sub-commission that investigated the Greek Case had four members and a large supporting staff.<sup>465</sup> Evidence was presented to the sub-commission both by the complaining countries and by the Greek government.<sup>466</sup> It had the financial resources to conduct 45 days of hearings and to publish a 1000-page report.<sup>467</sup> An NGO mission consisting of two per-

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458. 2 Council of Europe, *supra* note 223, pt. 1, at 418, 421. Further investigation was needed in 17 other cases to establish conclusive proof, but the government refused to cooperate. *Id.* at 422.

459. *Id.* at 14, 421.

460. *Id.* at 418-19.

461. See *The Greek Case in the U.N.: Hearing Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 724 (1974); AI, *Report on Torture* 115-16 (2d ed. 1975).

462. See Ermacora, *Enquiry Procedures*, *supra* note 14, at 202; see, e.g., Bizerta Report, *supra* note 59; Lawyers Committee for International Human Rights, *Violations of Human Rights in Argentina: 1976-1979*, at iv (1979).

463. International Commission of Jurists, *Uganda and Human Rights*, Reports to the U.N. Commission on Human Rights 5 (1977).

464. See Salzberg, *Monitoring Human Rights Violations: How Good is the Information?*, in *Human Rights and U.S. Foreign Policy* 173, 177 (P. Brown & D. MacLean eds. 1979); notes 27-38 *supra*.

465. 1 Council of Europe, *supra* note 223, pt. 1, at vi; see AI, *Report on Torture* 94 (2d ed. 1975).

466. 2 Council of Europe, *supra* note 223, pt. 2, at 2-39 (Annex I).

467. *Id.*; 1 Council of Europe, *supra* note 223, pt. 1, at 2-5; see AI, *Report on Torture* 93

sons visiting a country for a few days often can gather much information about allegations of mistreatment, but cannot realistically be expected to acquire direct evidence concerning each charge.

In the absence of direct evidence, NGO missions rely on the number of allegations of torture and the similarity of alleged circumstances to establish a *prima facie* case of mistreatment. Where 50 complaints of mistreatment are received, and all describe similar types of torture at the same locations, there is a substantial likelihood that some form of torture is being conducted. Findings of fact based on such evidence have proven reliable in the past.<sup>468</sup> Given experienced fact-finders, indirect evidence can be sifted to reveal a pattern of governmental misconduct.<sup>469</sup>

The problem with the use of indirect evidence is not so much reliance thereon, but the failure to distinguish in fact-finding reports between findings based on direct evidence and inferences based on indirect evidence. NGOs should clearly indicate the basis for their conclusions.<sup>470</sup>

### c. *Admissions Against Interest*

Although governments generally attempt to protect their human rights images, they are occasionally compelled to admit some violations when confronted by substantial evidence of wrongdoing. For example, an NGO may announce that a particular government has detained several thousand political prisoners; the government may consequently admit to holding half that number.<sup>471</sup> Because government statements in this context are usually issued only after careful deliberation and because the government is usually in the best position to know the truth, the NGO may appropriately accept the government's admission against interest as a fact or at least as a minimum figure for the number of prisoners held.<sup>472</sup>

NGOs may also receive government statements that only par-

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(2d ed. 1975).

468. See, e.g., AI Mission to Argentina, *supra* note 68, at 26-28; AI Mission to the Philippines, *supra* note 29, at 12; AI, The Republic of Nicaragua 39 (1977).

469. See Torture in Brazil, *supra* note 27, at 16; note 448 *supra*; see, e.g., AI, Israel-Syria Report, *supra* note 292, at 8.

470. See J. Ralston, *supra* note 390, at 216-17. See also notes 484-501 *infra* & accompanying text.

471. See, e.g., AI, Chile 16 (1974); AI, Indonesia 41-44 (1977); AI, Violations of Human Rights and Fundamental Freedoms in the Democratic Republic of Afghanistan 9-10 (1979).

472. See, e.g., AI, Amnesty International Report 1978, at 112-14 (1979); AI, Amnesty International Report 1977, at 13 (1977); AI Mission to the Philippines, *supra* note 29, at 6.

tially deny or indirectly admit human rights violations. NGOs usually and appropriately construe such limited admissions most strictly against the government.<sup>473</sup> For example, a representative of the Argentinian Ministry of the Interior denied that his government used electric prods to torture prisoners but displayed a working familiarity with such instruments.<sup>474</sup>

A more difficult issue is posed by a government's silence in the face of accusations concerning human rights violations. A government may stand mute because it is guilty of human rights violations or because it may not want to lend any credence to the allegations and to the accusing NGO by repeating the accusations in the process of denying them.<sup>475</sup> When presented with a well-documented report of human rights violations by one of the more prestigious NGOs in this field, a government should probably be expected to respond or should at least expect that its silence will be the subject of comment in later NGO reports. Indeed, under article 51 of the Statute of the Inter-American Commission on Human Rights, an accused government is obliged to respond within a certain period or the alleged facts are taken as established.<sup>476</sup> Perhaps NGOs cannot automatically take silence as an admission of guilt because governments do not have any legal obligation to respond. But the conduct of a government, including silence in the face of accusations, is a significant factor to be considered by NGOs in assessing the veracity of human rights information.

#### d. *Witness Conduct*

The demeanor of a witness may indicate confidence or nervousness, from which a finder of fact may infer the veracity of state-

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473. See Cohn, *supra* note 304, at 46; see, e.g., AI, Amnesty International Report 1978, at 54-55 (1979); AI Mission to Argentina, *supra* note 68, at 17-18; AI, Islamic Republic of Pakistan 12-16 (1977); International Defense & Aid Fund, Political Prisoners in Rhodesia in 1979, at 8-9 (1979).

474. See AI Mission to Argentina, *supra* note 68, at 53.

475. See, e.g., AI, Political Imprisonment in Spain 31 (1973); AI Mission to Sri Lanka, *supra* note 39, at 9; AI, Violations of Human Rights and Fundamental Freedoms in the Democratic Republic of Afghanistan 14-15 (1979) (refusal to let an observer see an allegedly tortured prisoner taken as corroboration of torture charges). But see AI, Political Imprisonment in South Africa 56, 76 (1978) (government officials deny absolutely that torture occurs or that it receives official sanction); Torture in Brazil, *supra* note 27, at 1 (The Brazilian government's only responses have been verbal attacks against AI.).

476. Regulations of the Inter-American Commission on Human Rights, art. 51, O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 26 (1976), reprinted in OAS Handbook, *supra* note 195, at 37.

ments made<sup>477</sup> or merely that the individual has a certain disposition.<sup>478</sup> The fact-finding reports of IGOs and NGOs do not usually make reference to the importance of a witness's conduct in assessing reliability, even though on-site missions are motivated to some extent by a desire to see and hear witnesses.

The Hague rules contain a provision which forbids witnesses from reading their statements.<sup>479</sup> Although this prohibition is not found in the U.N.<sup>480</sup> or other rules, the Hague rules in this respect reflect a useful practice which would concentrate the limited time of an inquiry body on assessing the credibility of the witnesses. Written statements may be submitted, however, and used either to prepare for questioning the witnesses or for other purposes at a later time.

The U.N. Draft Model Rules, however, do exclude witnesses from the hearing room while others are testifying if the testifying witness so requests.<sup>481</sup> The ICRC also follows this pattern, since ICRC visitors to prisons always interview detainees individually.<sup>482</sup> Other NGOs might consider adopting a similar approach, especially where a mission is pressured by a government to accept the government's "arrangements" for the taking of evidence.<sup>483</sup>

#### *e. Burden of Proof and Production of Evidence*

The concepts of burden of proof and burden of production of evidence play a very significant role in assuring the reliability of factual findings by placing responsibility for the production of evidence on the party who either ought to possess the evidence or has the greatest interest in presenting it,<sup>484</sup> and by establishing a bur-

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477. See Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A. J. 580, 581-82 (1961); note 390 *supra*.

478. Sahm, *supra* note 477, at 581-82.

479. Hague Convention of 1907, *supra* note 76, art. 27; see W. Shore, *supra* note 14, at 120.

480. Draft Model Rules of Procedure, *supra* note 124 (Rule 23(c) merely states: "Each witness shall then be given an opportunity to make a statement.").

481. Draft Model Rules of Procedure, *supra* note 124, at 11-12, rule 22(d), (e).

482. ICRC Model Memorandum, *supra* note 379; Forsythe, *Present Role of the Red Cross in Protection* 36 (1975) (background paper No. 1 for the Joint Committee for the Re-appraisal of the Role of the Red Cross).

483. See, e.g., AI Israel-Syria Report, *supra* note 292, at 4, 8; National Lawyers Guild, *Treatment of Palestinians in Israeli-Occupied West Bank and Gaza* 102 (1978).

484. See C. McCormick, *supra* note 268, at § 337; D. Sandifer, *supra* note 415, at 123-24; 9 J. Wigmore, *Evidence* § 2486 (3d ed. 1940).

den of persuasion for the proponent of a position.<sup>485</sup> It may well be that an NGO, which is both the investigator and the decision-maker, bears the burden of producing all evidence necessary to support its findings. The accused government, however, has both an interest in the proceeding and is most able to locate and present relevant material. The Inter-American Commission on Human Rights<sup>486</sup> appears to place a burden of production upon governments under investigation. Similarly, if an NGO can at least establish a *prima facie* case that human rights violations have occurred, it may then insist that the government discharge a burden of presenting contradictory evidence.<sup>487</sup> This "rule" probably best describes the working of public opinion when an NGO has reported that human rights have been violated and the government has failed to rebut the findings presented in the report.

There remains a question, however, as to the burden of proof that an NGO ought to bear in finding a *prima facie* case worthy of government response. The European Commission on Human Rights required proof beyond a reasonable doubt in the Greek Case, in which applications were brought by several other European countries against Greece.<sup>488</sup> The European Commission does not, however, appear to use such a severe standard for individual applications, although the precise burden is not clear.<sup>489</sup> The U.N. *Ad Hoc* Working Group on Chile also distinguished between particular cases that were proven beyond a reasonable doubt<sup>490</sup> and other individual allegations or general patterns of government conduct on which information from reliable sources had been received.<sup>491</sup>

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485. See C. McCormick, *supra* note 268, at §§ 336, 338; 9 J. Wigmore, *Evidence* §§ 2485-87 (3d ed. 1940). See generally D. Sandifer, *supra* note 415, at 125; Note, *supra* note 95, at 156-61.

486. Regulations of the Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 26, art. 51 (1967), reprinted in OAS Handbook, *supra* note 195, at 37.

487. For example, the ICRC uses a rule of thumb that where visible traces of torture are found, the burden of proof shifts to the detaining authority to prove that acts of torture did not take place. See Cohn, *International Fact-Finding and the Rule of Law*, 1977 Israel Y.B. on Human Rights 9, 18; ICRC and Torture, *supra* note 388, at 3.

488. 2 Council of Europe, *supra* note 223, pt. 1, at 14.

489. See notes 218-24 *supra* & accompanying text.

490. Report of the Economic and Social Council, Protection of Human Rights in Chile, U.N. Doc. A/33/331, at 96 (1978).

491. *Id.* at 98-99, 115, 227; cf. Cohn, *supra* note 304, at 47-48 (Reports of internationally accredited sources such as the International Red Cross and World Health Organization are given evidentiary weight but are not considered conclusive.).

AI demanded proof beyond a reasonable doubt during its mission to Israel,<sup>492</sup> but the AI report on its mission to Argentina reflects a variety of standards: "There was strong evidence . . . ;"<sup>493</sup> "Amnesty International believes that . . . ;"<sup>494</sup> "it is clear that . . . ;"<sup>495</sup> "it is apparent that . . . ;"<sup>496</sup> "There is evidence that . . . ;"<sup>497</sup> "Numerous well-substantiated accounts of maltreatment of prisoners during transfers have been documented by Amnesty International,"<sup>498</sup> "There is no doubt that . . . ;"<sup>499</sup> "Summary executions of political prisoners have occurred . . . ;"<sup>500</sup> "The evidence . . . is overwhelming."<sup>501</sup> The disparity among these various measures of proof may be due to differences among mission members or may reflect only stylistic considerations. A mission may, indeed, discover evidence of varying weight and persuasiveness, but some consistency and care in the formulation of factual findings would appear appropriate in human rights reports. The reader of a report should be informed of the standard of proof employed by the fact-finder.

The degree of proof employed by an NGO may vary, depending upon the impact of the action that follows a fact-finding effort. For example, if an NGO proposes only to send a diplomatic letter of inquiry to a government, the NGO may merely need credible second-hand reports of human rights violations. If an NGO is publishing a major report, it ought to require more substantial evidence of wrongdoing. This distinction is quite similar to that drawn in common law countries between civil and criminal cases, in which different degrees of proof are used for proceedings of quite distinct consequences. In any case, it is not imperative that any single standard be used in NGO fact-finding, but it is important that the standard for significant conclusions be clearly defined and disclosed in NGO reports.

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492. AI, Israel-Syria Report, *supra* note 292, at 31.

493. See AI Mission to Argentina, *supra* note 68, at 10.

494. *Id.* at 18, 36, 50.

495. *Id.* at 11, 19.

496. *Id.* at 13, 35, 39, 46.

497. *Id.* at 19, 29, 48.

498. *Id.* at 22.

499. *Id.* at 23.

500. *Id.* at 24.

501. *Id.* at 32.

## E. Reports

Once the facts are found, NGOs face the question of how to treat such facts in their final reports. NGOs must consider what law is to be applied to the facts, whether recommendations ought to be made, and how dissenting views, if any, ought to be handled.

### 1. *Applicable Law*

There are several possible standards against which an NGO might judge a government's human rights practices. Those standards include the laws of the country, treaties to which the nation is a party, and other prevailing international norms.

Often fact-finders discover that the government is clearly not obeying even its own constitution, statutes, and judicial decisions.<sup>502</sup> Occasionally, a mission will include an expert on the jurisprudence of the country visited,<sup>503</sup> but most frequently NGOs lack the requisite expertise to ascertain difficult problems of domestic law. Some missions may, however, consult domestic legal experts.<sup>504</sup>

NGO fact-finders also refer to treaties that have been signed<sup>505</sup> or ratified by the nation under scrutiny.<sup>506</sup> For example, in its study of the events in East Pakistan which led to the independence of Bangladesh, the ICJ noted that Pakistan had assured India in a 1950 treaty that it would guarantee equality to all citizens regardless of religious differences.<sup>507</sup> The ICJ also referred to the Convention on the Elimination of All Forms of Racial Discrimination,<sup>508</sup> the Geneva Conventions of 1949,<sup>509</sup> and the Genocide Con-

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502. See, e.g., AI, *An Amnesty International Report, including the findings of a mission to Nicaragua*, 10-15 May 1976, at 6, 10, 14, 19-20, 31, 38-39 (1977); AI, *Political Imprisonment in Spain* 10 (1973); East Pakistan, *supra* note 361, at 46-48.

503. See, e.g., AI, *The Republic of Nicaragua* 5 (1977) (One of the mission delegates was Dr. Kurt Madlener, Director of the Department of Hispanoamerican Penal Law of the Max Planck Institute.).

504. See, e.g., International Commission of Jurists, *A Preliminary Report by the Members of the International Commission of Jurists Mission to Chile*, April 1974, at 1 (1974); cf. G. White, *The Use of Experts by International Tribunals* 61-66 (1965) (discussing the propriety of using local expert witnesses for trials).

505. See Weissbrodt, *U.S. Ratification*, *supra* note 441, at 42 n.63; see, e.g., AI, *Amnesty International Briefing: Guatemala* i (1976).

506. See, e.g., AI, *Amnesty International Briefing: Iran* 5 (1976); AI, *Amnesty International Briefing: Paraguay* i (1976).

507. East Pakistan, *supra* note 361; see *Accord Respecting Religious Minorities*, April 8, 1950, 131 U.N.T.S. 3.

508. East Pakistan, *supra* note 361, at 51; see *International Convention on the Elimina-*

vention,<sup>510</sup> all of which Pakistan had ratified. Significantly, the ICJ referred first to the International Bill of Human Rights,<sup>511</sup> even though Pakistan had ratified neither the International Covenant on Civil and Political Rights<sup>512</sup> nor the International Covenant on Economic, Social and Cultural Rights.<sup>513</sup> Most NGO human rights reports refer to the Universal Declaration of Human Rights and/or the International Bill of Human Rights because they contain authoritative definitions of international human rights<sup>514</sup> and because they are so well-known.<sup>515</sup> Finally, the ICJ inquiry on Pakistan discussed the principles of customary international law found in the Nuremberg Charter.<sup>516</sup>

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tion of All Forms of Racial Discrimination, opened for signature, Dec. 21, 1965, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

509. East Pakistan, *supra* note 361, at 53-55. The ICJ referred generally to all of the Geneva conventions done on August 12, 1949 dealing with the laws of war.

510. East Pakistan, *supra* note 361, at 55-57; see Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

511. East Pakistan, *supra* note 361, at 50-51. See generally H. Lauterpacht, *An International Bill of the Rights of Man* 92-165 (1945); Weissbrodt, *Human Rights Legislation and United States Foreign Policy*, 7 Ga. J. Int'l & Comp. L. 231, 265-66 n.116 (1977) [hereinafter cited as Weissbrodt, *Human Rights Legislation*].

512. See *Human Rights International Instruments: Signatures, Ratifications, Accessions, etc.*, U.N. Doc. ST/HR/4, at 12 (1978); *Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions: List of Signatures, Ratifications, Accessions, etc.* as at 31 December 1979, U.N. Doc. ST/LEG/SER.D/13 (1980). See also Coalition for a New Foreign and Military Policy, *The Human Rights Covenants: One Body of Rights, Covenants Action Guide* 7 (undated).

513. See authorities cited in note 512 *supra*.

514. See Buergenthal, *Codification and Implementation of International Human Rights*, in *Human Dignity, The Internationalization of Human Rights* 15, 15-18 (1979); Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in *Human Rights: Thirty Years After the Universal Declaration* 21, 28-37 (1979); Weissbrodt, *Human Rights Legislation*, *supra* note 511, at 265-66 n.116; see, e.g., AI, *Political Imprisonment in Spain* 8 (1973).

515. See United Nations, *The International Bill of Human Rights* (1978); AI, *International Bill of Human Rights* (1978); American Association for the International Commission of Jurists, *International Bill of Human Rights* (undated).

516. East Pakistan, *supra* note 361, at 58-60; see R. Woetzel, *The Nuremberg Trials in International Law* 233-34 (1962). See also P. Calvocoressi, *Nuremberg: The Facts, the Law and the Consequences* 132-34 (1948).

As to specific problems, other standards may, of course, be applicable. See, e.g., *Violations of Human Rights in Southern Africa*, U.N. Doc. E/CN.4/1311, at 7-8 (1979); AI, *Violations of Human Rights and Fundamental Freedoms in the Democratic Republic of Afghanistan* 17-18 (1979) (U.N. Standard Minimum Rules for the Treatment of Prisoners). See generally Draft Convention on State Responsibility, arts. 16-18, [1976] 2 Y.B. Int'l L. Comm'n 73, 74-75, U.N. Doc. A/CN.4/SER.A. (1976).



The International Commission of Jurists' report on East Pakistan may serve as a model for similar efforts to assess facts under domestic law, all the relevant human rights treaties, and under applicable customary international law. Obviously, other sources may be apposite in different countries and situations, but the approach of the ICJ is far more thorough than that of many other NGOs that have used only the Universal Declaration of Human Rights,<sup>517</sup> or have even failed to include any references to applicable legal standards.<sup>518</sup>

## 2. *Recommendations*

Under the Hague model of inquiry, commissions were strictly limited to finding facts and could not make recommendations.<sup>519</sup> This limited role for inquiry commissions was intended to clarify the distinction between Hague fact-finders, on the one hand, and arbitral tribunals that make awards or political bodies that make political judgments, on the other. During the period from 1907 through 1940, the Hague approach slowly broke down as more inquiry commissions began to issue reports with recommendations to their parent bodies.<sup>520</sup>

The Statute of the Inter-American Commission on Human Rights calls for recommendations in addition to findings of fact,<sup>521</sup> and each report of the Commission contains conclusions and recommendations.<sup>522</sup> Ad Hoc fact-finding bodies of the United Nations generally make recommendations to the Commission on

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517. See, e.g., AI Mission to Korea, *supra* note 276 at 10-11; International Commission of Jurists, Report on the Events in Panama January 9-12, 1964, at 3, 8 (undated).

518. See, e.g., AI, Chile (1974); AI, Indonesia (1977); AI, Report of an Amnesty International Mission to Spain (1975).

519. Hague Convention of 1907, *supra* note 76, art. 35. See also N. Bar-Yaacov, *supra* note 14, at 105.

520. See note 92 *supra* & accompanying text.

521. Statute of the Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.26, doc. 10, art. 9 (bis) (1971), reprinted in OAS Handbook, *supra* note 195, at 27. See also Regulations of the Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 26, art. 52 (1967), reprinted in OAS Handbook, *supra* note 195, at 37.

522. See, e.g., Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Panama, O.A.S. Doc. OEA/Ser.L/V/II.44, doc. 38 rev. 1, at 114-16 (1978); Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Uruguay, O.A.S. Doc. OEA/Ser.L/V/II.43, doc. 19 corr. 1, at 69-70 (1978); Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Paraguay, O.A.S. Doc. OEA/Ser.L/V/II.43, doc. 13 corr. 1, at 86-89 (1978).

Human Rights or the General Assembly, even when such action is not included in their terms of reference.<sup>523</sup> For example, the terms of reference for the *Ad Hoc* Working Group on Chile only called for it to "inquire into the present situation of human rights in Chile" and "to report the results of its inquiries."<sup>524</sup> Despite this narrow mandate, the Working Group has recommended courses of action to the General Assembly in each one of its reports beginning with its interim report in 1975.<sup>525</sup> In its 1978 report, the Working Group no longer confined itself to making recommendations to its constitutive body, but proceeded to make recommendations directly to the Chilean government.<sup>526</sup>

The practice of NGOs is varied, but the separation of roles established in the Hague model is remarkably well observed. Some missions simply report their factual findings to their constituting organizations without making any recommendations.<sup>527</sup> AI reports, however, always contain recommendations to the concerned country.<sup>528</sup> These are not generally the recommendations of the inquiry mission, however, but of AI itself, based upon the factual findings of the mission.<sup>529</sup> The reports do not indicate whether the mission

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523. See, e.g., Report of the *Ad Hoc* Working Group of Experts on Violations of Human Rights in Southern Africa, U.N. Doc. E/CN.4/1311 at 174-82 (1979); Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, 31 U.N. GAOR Supp. (No. 35) at 13-15, U.N. Doc. A/31/35 (1976); Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, U.N. Doc. A/9148 at 43-47 (1973).

524. Report of the Economic and Social Council, Protection of Human Rights in Chile, U.N. Doc. A/10285 at 92-93 (1975).

525. *Id.* at 55, 66. See also N. Bar-Yaacov, *supra* note 14, at 279-80.

526. See Report of the Economic and Social Council, Protection of human rights in Chile, U.N. Doc. A/33/331, at 226, 229 (1978).

527. Pax Romana Mission, *supra* note 372; Bizerta Report, *supra* note 59, at 11-16; see, e.g., Belgrade Rules, *supra* note 69, at 165, rule 23 (The final report of the mission is to contain findings, but the rule does not suggest inclusion of recommendations.).

528. See, e.g., AI, Islamic Republic of Pakistan 7-10 (1977); AI Mission to the Philippines, *supra* note 29, at 13-19, AI, Report of an Amnesty International Mission to Spain 14-16 (1975).

The ICRC apparently follows the practice of making recommendations to the government after prison visits on such issues as the treatment of prisoners, judicial procedures applicable to prisoners, family visits, work and study in prison, physical exercise, medical care, and aid to the families of prisoners. See Comité International de la Croix-Rouge, Rapport de Synthèse Faisant Suite à la Deuxième Série de Visite des Délégués du Comité International de la Croix-Rouge à 2449 Détenu de Sécuite, Dont 165 Femmes, dans 17 Prisons Iraniennes (Feb. 22, 1978).

529. See House Hearings on International Protection of Human Rights, *supra* note 1 (statement of Frank C. Newman); see, e.g., AI, An Amnesty International Report including the findings of a mission to Pakistan 23 April-12 May 1976, at 7-10 (1977); AI Mission to

submitted recommendations along with its findings to AI.

Notwithstanding the practice of AI, some NGO fact-finding commissions do make recommendations in various forms. The British Guiana Commission of the ICJ made recommendations directly to the government of British Guiana pursuant to the commission's terms of reference.<sup>530</sup> The Commission of Inquiry to Mexico did not make any recommendations to the International League for Human Rights and Pax Romana, but two members of the commission (with the approval of their sponsoring organizations) sent a letter to the Interior Minister of Mexico stating their findings and recommending that measures be taken to curtail the government's illegal practices.<sup>531</sup>

The Report of the National Lawyers' Guild 1977 Middle East Delegation reflected all of these approaches. While the conclusion of the report was limited to a statement of the mission's factual findings,<sup>532</sup> the delegation at one point in the report made a recommendation directly to the government.<sup>533</sup> The foreword to the report contained the recommendation of the sponsoring organization.<sup>534</sup> Along the same lines, the Unitarian Universalist Service Committee mission to El Salvador reported its factual findings in the conclusion of its report<sup>535</sup> followed by a section addressed to the world public, the U.S. government, and El Salvador in which were listed seven recommended improvements to foster observance of human rights in El Salvador.<sup>536</sup>

Of course, where inquiry bodies are self-constituted like the Russell Tribunal<sup>537</sup> or the International Commission of Inquiry in Chile,<sup>538</sup> the Commission itself makes recommendations either to the concerned countries,<sup>539</sup> "to the conscience of all people,"<sup>540</sup> or

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Korea, *supra* note 276, at 9-14; AI, *The Republic of Nicaragua* 39-40 (1977).

530. International Commission of Jurists, *Report of the British Guiana Commission of Inquiry* 15, 43-45, 115-21 (1965). See generally Ermacora, *Enquiry Procedures*, *supra* note 14, at 199.

531. *Pax Romana Mission*, *supra* note 372, at app. I.

532. *National Lawyer's Guild*, *supra* note 483, at 119-21.

533. *Id.* at 117.

534. *Id.* at vii-viii.

535. *Human Rights in El Salvador*, *supra* note 294, at 28-29.

536. *Id.* at 33-36.

537. See *Against the Crime of Silence*, *supra* note 275, at 14-16.

538. See *International Commission of Enquiry into the Crimes of the Military Junta in Chile, One Year of the Rule of Terror in Chile* (1974).

539. See *Against the Crime of Silence*, *supra* note 275, at 650-52 (recommendation to world opinion for the withdrawal of American troops from the Vietnam conflict).

to "the highest moral and spiritual authorities."<sup>541</sup> In general, however, the prevailing NGO practice of separating fact-finding by inquiry missions from human rights campaign activity by the NGOs themselves reflects the specialized, impartial, fact-finding role of inquiry commissions originally envisioned by the Hague treaty and should be continued.

### 3. *Minority Views*

Minority opinions and reservations of individual members are apparently never found in NGO fact-finding reports. They are found frequently in opinions of the European Court on Human Rights<sup>542</sup> and occasionally in Inter-American Commission<sup>543</sup> and U.N. fact-finding reports.<sup>544</sup> Rule 25(b) of the U.N. Draft Model Rules calls for every dissent or abstention to be recorded.<sup>545</sup> Since many NGO missions consist of only two or three persons, it is not surprising that dissenting opinions are absent. Given the manner of selecting NGO mission members, it is not likely that sharp disagreement would arise. Nevertheless, working procedures for NGO missions should give members the option of not joining in the majority conclusions.

### F. *Dissemination of Reports*

The major question concerning dissemination of fact-finding reports is whether reports should be submitted to the concerned government for comment or rebuttal before release to the public. There are two reasons for following this procedure. First, given the less than conclusive evidence upon which some findings are based, fairness requires that governments be given a chance to rebut the

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540. Repression in Latin America, *supra* note 275, at 161.

541. *Id.*

542. See, e.g., *Case of Klass and others*, 1978 Y.B. Eur. Conv. on Human Rights 622 (Eur. Comm. on Human Rights) (Farinha, J., separate opinion); *Lawless Case (Merits)*, 1961 Y.B. Eur. Conv. on Human Rights 438, 488 (Eur. Comm. on Human Rights) (Mavidakas, J., submitted a separate opinion in accordance with Rule 50, para. 2 of the Rules of the Court.).

543. See, e.g., *Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Chile*, O.A.S. Doc. OEA/Ser.L/V/II.37, doc. 19 corr. 1, at 191 (1976).

544. See *Bender*, *supra* note 251, at 254 n.56.

545. *Draft Model Rules of Procedure*, *supra* note 124, at 13; *Model Rules*, *supra* note 125, at 7, rule 20(b); see *W. Shore*, *supra* note 14, at 117-18. While it is correct to provide for the reporting of dissenting views, as does rule 23 of the *Belgrade Rules*, *supra* note 69, at 165, such dissents are extraordinarily rare, if not nonexistent, in NGO fact-finding.

conclusions.<sup>546</sup> Second, failure of the government to rebut adverse conclusions helps support the report's findings.<sup>547</sup>

The 1970 U.N. Draft Model Rules did not expressly require that reports be submitted to the concerned government prior to publication, but such a procedure is implied in rule 26(c) in the statement that government comments, if any, are to be submitted with the report to the organ that created the fact-finding body.<sup>548</sup> The authorizing organ would then decide on publication.<sup>549</sup> Interestingly, the U.N. Model Rules, as they were finally adopted in 1974, provide in rule 20(c) that only after publication of the report may a concerned government submit its comments.<sup>550</sup> Nevertheless, the Working Group on Chile did submit its information to the Chilean government for comment and included in its report the comments received in meetings and written communications.<sup>551</sup> After the Working Group published its findings, the Chilean government also responded in writing.

NGOs regularly submit their findings to and/or solicit evidence from concerned States.<sup>552</sup> Often, an agreement to submit findings and receive government comment is a precondition to permission for on-site visitation.<sup>553</sup> The major problem with this procedure has been the refusal of governments to respond.<sup>554</sup> For example, AI presented its report to the Prime Minister of Sri Lanka on May 8, 1975, with a promise that the report would remain confidential until AI had learned the government reaction.<sup>555</sup> Eight months passed without any reply despite renewed requests, before the organiza-

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546. See Cohn, *supra* note 304, at 47.

547. See notes 471-76 *supra* & accompanying text.

548. Draft Model Rules of Procedure, *supra* note 124, at 13.

549. *Id.* at 13, rule 26(d).

550. Model Rules, *supra* note 125, at 7.

551. Report of the Economic and Social Council, Protection of human rights in Chile, U.N. Doc. A/33/331, at 12-13 (1978).

552. See, e.g., Human Rights in El Salvador, *supra* note 294, at 17-19; East Pakistan, *supra* note 361, at 5-6; International Commission of Jurists, Report on the Events in Panama January 9-12, 1964, at 7 (undated). See also notes 471-76 *supra* & accompanying text.

553. See, e.g., AI Mission to Sri Lanka, *supra* note 39, at 9.

554. See, e.g., AI, Political Imprisonment in the People's Republic of China ix-x (1978); Torture in Brazil, *supra* note 27, at 1; AI Mission to the Philippines, *supra* note 29, at 7-8. The Belgrade Rules usefully recommend that preliminary findings be submitted to the government concerned "giving it an opportunity, within a reasonable time, to present comments and/or rectify the matter investigated." Belgrade Rules, *supra* note 69, at 165, rule 22.

555. AI Mission to Sri Lanka, *supra* note 39, at 9.

tion published its report.<sup>556</sup>

The events surrounding the publication of the AI report on the Philippines demonstrate the problems involved in withholding publication of a report.<sup>557</sup> On May 25, 1976, AI sent its report to the Philippine government and requested comment.<sup>558</sup> During June, two news agency dispatches from Manila referred to the mission report and its contents.<sup>559</sup> Without responding to AI's requests for comment, the Philippine consulate in San Francisco issued official statements in mid-July criticizing the conclusions of the unpublished report.<sup>560</sup> AI finally published the full report on July 26.<sup>561</sup> The Philippine government later issued a formal reply and AI published a second edition of the report including the government reply.<sup>562</sup>

An NGO should never make a commitment to withhold publication of a report until it receives a government's comment. A time limit for response should be set at the time the report is submitted to the government, with the proviso that the full report will be published immediately upon any public release or public comment by the government.

Both intergovernmental and nongovernmental fact-finding bodies generally seek the broadest possible dissemination of their reports.<sup>563</sup> Nevertheless, these human rights reports often receive only very summary press comment<sup>564</sup> and become known to relatively few informed people. United Nations, OAS, and other intergovernmental reports covering human rights are usually lost in a

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556. *Id.*

557. AI Mission to the Philippines, *supra* note 29, at 4-5. Since human rights situations often change rapidly and because atrocities can be perpetrated suddenly, an NGO can be most effective if it obtains fresh, first-hand information and uses it promptly in discussions with the government or for dissemination to the public. See, e.g., *Disappeared Persons and Some International Emergency Measures to Cope with this Phenomenon*, U.N. Doc. E/CN.4/NGO/283 (1980).

558. AI Mission to the Philippines, *supra* note 29, at 7.

559. *Id.*

560. *Id.* at 8, 59.

561. AI, Report of an Amnesty International Mission to the Republic of the Philippines (1976).

562. AI Mission to the Philippines, *supra* note 29, at 65-84.

563. See notes 8-12, 27-30, 44, *supra*. See also Weissbrodt, *International NGOs*, *supra* note 1, at 304-10.

564. See, e.g., *Jurists' Group Declares "Structure of Repression" In Chile Has Not Changed*, N.Y. Times, Jan. 5, 1978, § A, at 12, col. 1; *Chile Still Violating Rights*, OAS Group Charges, N.Y. Times, May 23, 1977, § A, at 7, col. 1; *Report on Argentina Calls Summary Killings Common*, N.Y. Times, March 24, 1977, § A, at 10, col. 1.

mass of documentation. These IGOs generally lack the facilities for making their human rights reports available to the general public, and usually distribute them only to depository libraries and to those individuals who make special requests.

NGOs are generally less prestigious and visible than IGOs and thus experience proportionately more difficulty in getting press comment on their human rights findings. Some NGOs, like the ICJ, have established excellent press contacts and frequently get more media coverage for their factual findings than do IGOs. Similarly, other organizations, like AI, have been able to develop campaign activities which reach its widely-scattered membership and which package its human rights reports in a way accessible to a broader group.<sup>565</sup> Despite all the difficulties that IGOs and NGOs have in disseminating their reports, the target government and its opponents invariably seem to receive copies for use or redistribution within their ranks.

One prominent, albeit partial, exception to the general desire of NGO fact-finders for the broadest possible publicity for its reports is found in the practice of the International Committee of the Red Cross. The ICRC generally provides detailed findings of its missions only to host governments.<sup>566</sup> In cases where governments misrepresent the findings, the ICRC reserves the right to release its results, but virtually never does so. The ICRC released a report in 1969 because the Greek government had misquoted ICRC delegates to the press and had published a part of their report.<sup>567</sup> Simi-

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565. See AI, Handbook 14-15, 16 (5th ed. 1977); see, e.g., Amnesty International, Urgent Action Network letter (Feb. 2, 1978) (concerning the abduction of seven lawyers in Argentina).

566. See J. Becket, *supra* note 388, at 98; D. Forsythe, *supra* note 20; ICRC and Torture, *supra* note 388, at 4; International Red Cross Quietly Aids Political Prisoners, *Wash. Post*, May 22, 1978, § A, at 14, col. 1. The general outline of an ICRC report is found in the ICRC Model Memorandum, *supra* note 379. This format appears to have been used in the visit to South African prisons. See Defense & Aid, Prisons, *supra* note 21, at 104-06. See, e.g., Agreement between the Government of the Kingdom of Greece and the International Committee of the Red Cross, in J. Becket, *supra* note 388, at 105-06.

567. Comité International des la Croix-Rouge, Rapport General sur les visites effectuees pas les Délégués du Comité International de la Croix-Rouge Aux Detenus Politiques en Grece, Mai 1967-Mars 1968, in J. Becket, *supra* note 388, at 99-102; see *id.* at 97-106. Another ICRC report on Greece which found *prima facie* evidence of torture was leaked to the Council of Europe. See D. Forsythe, *supra* note 20, at 79 n.29; ICRC and Torture, *supra* note 388, at 4. Similarly, the ICRC published a report on the status of civilian detainees in Israeli-occupied territories following an unsatisfactory response by Israel to ICRC requests and publication by Jordanian officials of part of the report. See D. Forsythe, *supra* note 20, at 178.

larly, in 1980, the ICRC issued full accounts of visits to Iranian prisons after the new Iranian government released partial ICRC reports.<sup>568</sup>

In addition, the ICRC releases some of the most important information its inquiry missions gather (including the identity of the detention centers visited and the number of political prisoners held) in the International Review of the Red Cross,<sup>569</sup> its annual reports,<sup>570</sup> ICRC press releases, and in the monthly ICRC Bulletin.<sup>571</sup> The ICRC rule of limited public dissemination probably helps its delegates obtain entry into more countries and more prisons than other organizations. The ICRC successfully relies for its results upon its great international prestige.<sup>572</sup> Other organizations must, however, rely on public opinion to achieve the human rights improvements they generally seek.

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A similar publication of favorable extracts by the Uruguayan government led to the termination of relations between ICRC and Uruguay. See International Association of Democratic Lawyers, *Mission d'enquête en Argentine et en Uruguay*, 10-20 Mai 1978, at 5 (1978). The partial publishing rule has sometimes been narrowly read by the ICRC to allow government publication of a single report rather than all relevant ICRC reports on the country. See D. Forsythe, *supra* note 20, at 63; D. Forsythe, *Present Role of the Red Cross in Protection* 32 (1975).

568. See, e.g., Comité International des la Croix-Rouge, *Rapport de Synthèse Faisant Suite à la Premier Serie de Visite des Délégués du Comité International de la Croix-Rouge*, à 3087 *Detenue de Securite dans 18 Prisons Iramiennes* (June 1, 1977).

569. See, e.g., 18 *Int'l Rev. Red Cross* 294-95, 298 (1978). The *Revue Internationale de la Croix-Rouge* has been published since 1919. There is a cumulative analytical index for the English language edition, which began in 1961. International Committee of the Red Cross, *Analytical Index 1961-1974* (1976).

570. See, e.g., International Committee of the Red Cross, *Annual Report 1978*, at 44-45 (1979) (number of detainees in Argentina and Indonesia).

571. See, e.g., ICRC Bull., No. 41, June 6, 1979, at 2 (prisoners in Malaysia). The International Review of the Red Cross and the ICRC Bulletin regularly contain the number of detention centers and political prisoners visited in a country. For example, the figures were released on a number of detention centers and political prisoners detained in Thailand, the Philippines, and Iran. 18 *Int'l Rev. Red Cross* 294-96 (1978). "The ICRC does publish the bare outline of what it is doing through regular publications but it rarely publishes the substance of what its delegates have seen." D. Forsythe, *supra* note 20, at 63. One who has some understanding of a situation from other sources can piece together fragments of information from the ICRC's publication. *Id.* The ICRC's policy regarding press releases is best summed up in its response to the U.N. *Ad Hoc* Working Group on South African prisons: "Whilst there is no secrecy about this work of the Red Cross, neither is there any publicity." Report of the *Ad Hoc* Working Group of Experts Set Up Under Resolution 2 (XXII) of the Commission on Human Rights, U.N. Doc. E/CN.4/950 at 36 (1967), quoted in Carey, U.N. Scrutiny, *supra* note 95, at 536.

572. See Comment, *supra* note 66, at 117.



#### IV. CONCLUSION: A SUGGESTED APPROACH TO NGO FACT-FINDING

Fact-finding is an essential part of the work of NGOs established to monitor and report on human rights violations throughout the world. Nevertheless, NGOs have traditionally failed to rely on any standard set of fact-finding procedures, even though the use of such procedures may enhance the respect accorded NGO findings and further the efforts of NGOs to secure cooperation from States and witnesses. NGOs should thus carefully consider the fact-finding models in use by both IGOs and other NGOs. The purpose of this article has been to describe such models, to recommend that NGOs adopt certain practices applicable to all fact-finding efforts, and to encourage NGOs to adopt whatever other procedures they find appropriate to their work.

Nevertheless, nothing herein should be construed as a proposed set of universal fact-finding procedures for use by all NGOs in all circumstances. On the contrary, it is the thesis of this article that efforts to impose uniform rules of procedure such as the Belgrade Rules are misguided and injurious to the mission of human rights NGOs. The fact-finding rules currently in existence reflect the experiences and objectives of IGOs and thus are inappropriate for wholesale adoption by NGOs. Most NGOs lack the resources available to IGOs and thus cannot be expected to perform the same fact-finding functions. Moreover, current rules were to some extent designed with the interests of governments in mind and thus may be insensitive to the special problems and needs of NGOs.

Notwithstanding the inadvisability of a uniform set of fact-finding rules for NGOs, there should be some way to encourage NGOs to conduct their fact-finding efforts in a fair and unbiased manner. A relatively non-restrictive way of doing this would be to require that NGOs disclose in their final reports certain information regarding the fact-finding methodology actually employed during the investigation of a human rights problem. If NGOs were required to reveal how they went about gathering the facts upon which their conclusions are based, they might be more inclined to adopt thorough and even-handed fact-finding policies and procedures. It would, of course, be impractical to require such disclosures in every letter, appeal or press release. Nevertheless, the report on any major inquiry should reflect the following: (1) the terms of reference of the fact-finding body, (2) the identity of the body's members, (3) a description of the materials upon which the report is based, including the identity of witnesses to the extent that their

safety will not be jeopardized, (4) any statements by the government under investigation or attempts made to obtain such government statements, (5) a description of the circumstances surrounding any interviews that may have been conducted during the course of the investigation, such as the identity of the interviewer(s), whether governmental officials were present, whether an oath or affirmation was administered, whether careful questioning was possible, the duration of the interviews, whether the interviews were public or private, whether witnesses were harassed during interviews, and what provisions, if any, were made for the protection of witnesses, (6) an account of any on-site visits made, including a list of participants, a description of places inspected, an account of contacts with government officials, and a description of facilities provided to the mission by the government, (7) whether the fact-finding body chose to disregard any evidence during the preparation of its report, (8) an indication of the methods employed to ensure the reliability of evidence, including any efforts made to corroborate witnesses' statements, the use of direct evidence, etc., (9) a specification of the international and/or municipal legal norms applied to the facts, (10) a clear separation of factual findings from any recommendations the NGO may wish to make, and (11) a statement of what efforts, if any, were made or will be made to obtain a government response to the report, and an account of any such response already obtained.

It should be noted that the foregoing disclosure standards do not purport to regulate the manner in which NGOs engage in fact-finding. These suggested standards are intended merely to enable interested observers and the international community to assess the reliability of an NGO's human rights fact-finding. The standards reflect an awareness that the need for reliability and fairness must be balanced against an NGO's need for flexibility in investigating and responding to human rights problems throughout the world.

